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IN THE

Supreme Court of the United States

BORDEN, INC., FLAV-O-RICH, INC., MCARTHUR DAIRY, INC., THE SOUTHLAND CORPORATION and T.G. LEE FOODS, INC.,

Petitioners,

v.

MORTON'S MARKET, INC. and J&J PRODUCE & DELI, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a private action for treble damages under the antitrust laws in which plaintiffs raise fraudulent concealment as an avoidance to defendants' statute of limitations defense, the Eleventh Circuit's requirement that defendants come forward with undisputed facts on summary judgment negating the alleged concealment conflicts with this Court's *Celotex* decision, and other relevant decisions of this Court and the Circuits.

2. Whether, in a private action for treble damages under the antitrust laws in which plaintiffs raise fraudulent concealment as an avoidance to defendants' statute of limitations defense, the Eleventh Circuit's rule that a plaintiff is not on inquiry notice unless it has "actual or constructive knowledge" of its claim conflicts with the standard established by this Court and other Circuits that a plaintiff is on inquiry notice when it possesses "facts sufficient to excite suspicion."

3. Whether, in a private action for treble damages under the antitrust laws in which plaintiffs raise fraudulent concealment as an avoidance to defendants statute of limitations defense, the Eleventh Circuit's rule that a plaintiff need not adduce any facts demonstrating the exercise of due diligence in order to avoid summary judgment conflicts with the decisions of this Court and other Circuits, and contravenes important policy considerations that underlie statutes of limitations.

CERTIFICATE OF INTERESTED PERSONS

In accordance with Supreme Court Rules 14(b) and 29(6), counsel for petitioners hereby certify that the following is a complete list of all parties and all parent companies and nonwholly owned subsidiaries of each of the corporate petitioners.

AEP Industries, Inc.
Amphenol Corporation
Bawco Corporation
Bev of Vermont, Inc.
Borden, Inc.
Borden Chemicals and Plastics Limited Partnership
Brazos Comercial E Empreendimentos Ltda.
Christy's Market, Inc.
Cityplace Center East Corporation
Dairy Farmers of America, Inc.
(formerly known as Mid-America Dairymen, Inc.)
Dean Foods, Inc.
Diageo, Inc.
Diageo plc
Flav-O-Rich, Inc.
Grand Metropolitan Incorporated
Gustafson's Dairy, Inc.
INDEX Corporation
IYG Holding Company
J&J Produce & Deli, Inc.
KinderCare Learning Centers, Inc.
Lavicio's, Inc.
McArthur Dairy, Inc.
Melin Enterprises, Inc.
Morton's Market, Inc.
MTA CAL, Inc.
Newsquest plc
Owens-Illinois, Inc.
Pet Incorporated

Philippine Seven Properties Corporation
Pillsbury Company, The
PRIMEDIA, Inc.
Puerto Rico—7, Inc.
REL TEC Corporation
Safeway, Inc.
Sao Paulo-Seven Comercial, S.A.
7-Eleven Beverage Company, Inc.
7-Eleven Canada, Inc.
7-Eleven Comercial Ltda.
7-Eleven, Inc.
7-Eleven International, Inc.
7-Eleven Limited
7-Eleven of Idaho, Inc.
7-Eleven of Massachusetts, Inc.
7-Eleven of Nevada, Inc.
7-Eleven of Virginia, Inc.
7-Eleven Pty. Ltd.
7-Eleven Sales Corporation
7-Eleven Stores (NZ) Limited
7-Eleven Stores Sales Corporation
7-Eleven Mexico, S.A. de C.V.
SLC Financial Services, Inc.
Southland Corporation, The
Southland International Investment Corporation N.V.
Southland Investment Canada Limited
T.G. Lee Foods, Inc.
TSC Lending Group, Inc.
The Seven Eleven Limited
The Southland Corporation Employees' Savings and Profit Sharing Plan Title Holding Corporation
Valso, S.A.
VWABC
Walter Industries, Inc.
World Color Press, Inc.

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Petitioners Borden, Inc., Flav-O-Rich, Inc., The Southland Corporation, T.G. Lee Foods, Inc., and McArthur Dairy, Inc. (collectively, "defendants") petition that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 20, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 198 F.3d 823. The opinion and order granting defendants' motion for summary judgment is reported at 985 F. Supp. 1440.

JURISDICTION

On December 20, 1999, a panel of the United States Court of Appeals for the Eleventh Circuit decided *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, Case No. 98-2498. This Court has jurisdiction to review the final decision of the United States Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Rule 56, Federal Rules of Civil Procedure:

> Rule 56. Summary Judgment
>
> . . .
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> . . .
>
> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits

shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

15 U.S.C. § 15b:

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

STATEMENT OF THE CASE

This consolidated action in the district court was the product of four separate cases filed against defendants in which plaintiffs, Morton's Market, Inc. ("Morton's") and J&J Produce & Deli, Inc. ("J&J") (collectively, "plaintiffs"), alleged the same conspiracy to fix the wholesale price of milk sold to commercial customers in Florida with varying alleged end-dates. (R1-1; R11-1; R13-28; R14-1; R15-1.) The district court had subject matter

jurisdiction over the civil action under 28 U.S.C. § 1331 by reason of the alleged claims arising under the laws of the United States (Sherman Antitrust Act; 15 U.S.C. §§ 1 *et seq.*). The court had supplemental subject matter jurisdiction under 28 U.S.C. § 1367.

The first complaint was filed by Morton's against Gustafson's Dairy, Inc. ("Gustafson's"), Borden, Inc., T.G. Lee Foods, Inc., Flav-O-Rich, Inc., and The Southland Corporation on July 1, 1993. (R1-1.) In that complaint, Morton's alleged the existence of a conspiracy to fix the wholesale price of milk in peninsular Florida from the "early 1970's and continuing at least through August 1988." (R1-1-8.) Morton's subsequently filed a virtually identical separate complaint against Pet Incorporated and McArthur Dairy, Inc. on September 12, 1994. (R14-1.) J&J filed a separate complaint against only Gustafson's on August 4, 1993, alleging a conspiracy "[b]eginning at least as early as January 1, 1970 and continuing thereafter to the present." (R11-1.) J&J subsequently amended this complaint to add the other defendants. (R13-78.)

The cases were eventually consolidated (R3-86.) and, pursuant to the consolidation order, plaintiffs filed their First Consolidated Amended Class Action Complaint on May 23, 1995, claiming for the first time that the alleged conspiracy continued "to at least May 13, 1992, the exact dates being unknown to the plaintiffs."[1] (R4-110-14.) Plaintiffs also claimed that the alleged price-fixing conspiracy was "fraudulently concealed by Defendants" and that "Plaintiffs had no knowledge of the antitrust viola-

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[1] Plaintiffs apparently selected May 13, 1992, as their new alleged termination date in reliance on a criminal information filed by the Department of Justice against Gustafson's on that date, notwithstanding the fact that the Gustafson's information specifically charged that the conspiracy ended no later than August 1988. (R9-231, Ex. D-4.)

tions . . . alleged or any facts that might have led to their discovery." (R4-110-18, 19.) All defendants moved to dismiss the new complaint on statute of limitations grounds. (R4-118, R4-119.)

Although the district court denied the motions to dismiss, holding that "the defendants' statute of limitations defense is incapable of resolution without looking beyond the four corners of the amended complaint," the court limited initial discovery to statute of limitations issues and directed defendants to file a summary judgment motion on that defense at the conclusion of such discovery. (R7-162.) The parties then conducted discovery on statute of limitations issues, including the duration of the alleged conspiracy and plaintiffs' allegations of fraudulent concealment. Defendants filed a joint motion for summary judgment, together with supporting memorandum and exhibits demonstrating that plaintiffs' claims were barred as a matter of law by the applicable four-year statute of limitations and that the record did not support application of the doctrine of fraudulent concealment to toll the limitations period. (R9-229; R9-230; R9-231.)[2]

In an order dated October 30, 1997, the district court granted defendants' motions for summary judgment, finding that "[t]he record fails to contain any evidence that any antitrust violation occurred after July 1, 1989, four years before the plaintiffs' first complaint." (App. B at 34a.) In fact, the district court found that the record contained no evidence of any acts in furtherance of the alleged conspiracy to fix the wholesale price of milk after 1987. (*Id.* at 36a.) The district court further held that the doctrine of fraudulent concealment did not apply to

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[2] Defendants Pet Incorporated, The Southland Corporation, and McArthur Dairy, Inc. also filed separate summary judgment motions based on grounds unique to those parties. (R9-227; R9-232; R9-233.)

toll the statute because plaintiffs were indisputably on inquiry notice concerning their potential claims at least as early as the beginning of 1988 and failed to exercise the requisite due diligence to investigate defendants' conduct. (*Id.* at 37a-41a.)

Pursuant to Fed. R. Civ. P. 54(b), the district court entered an order dated March 22, 1998, directing that final judgment be entered pursuant to its October 31, 1997, order. (App. C at 45a.) Timely notices of appeal were taken from the district court's final judgment. (R10-294; R10-295; R10-296.)

On December 20, 1999, a panel of the Eleventh Circuit reversed the district court's entry of summary judgment in favor of defendants, disagreeing with the district court's finding that plaintiffs' fraudulent concealment claim failed as a matter of law. The panel correctly noted that plaintiffs would have the burden of proof at trial of proving the following elements of fraudulent concealment: "the defendants concealed the conduct complained of, and that [plaintiffs] failed, despite the exercise of due diligence on [their] part, to discover the facts that form the basis of [their] claim." (App. A at 14a (quoting *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979)). However, the panel went on to shift the summary judgment burden to defendants to *negate* plaintiffs' fradulent concealment claim. It stated: "In order to be entitled to judgment as a matter of law on these issues, then, the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims, and that, had they exercised reasonable diligence, they would have discovered adequate grounds for filing this antitrust lawsuit during the limitations period." (App. A at 14a; *see also id.* at 15a-16a.)

The panel further ruled that an antitrust plaintiff seeking to avoid the statute of limitations by asserting a fraudulent concealment avoidance is not on inquiry notice and thereby under a duty to investigate the possibility of whether it has a claim unless it already has "actual or constructive knowledge" of its claim—as opposed to having facts sufficient to excite suspicion that a claim may exist. It stated: "It is not enough for summary judgment to point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment." (App. A at 16a.)

The panel finally ruled that a plaintiff on inquiry notice need not exercise due diligence in attempting to discover whether it has a claim, concluding that the fraudulent concealment doctrine protects the vigilant and the nonvigilant alike. (App. A at 22a-23a.)

REASONS FOR GRANTING THE WRIT

This Petition arises from the increasing confusion in the Circuits over the interplay between this Court's summary judgment standard and the doctrine of fraudulent concealment. Simply put, the panel's opinion is directly at odds with the summary judgment standard established by this Court, and it conflicts with the application of this Court's *Celotex* standard in the statute of limitations-fraudulent concealment context by all other circuits, except perhaps the Fifth Circuit. The panel shifted the summary judgment burden to defendants, requiring them to come forward with evidence conclusively negating the elements of the nonmoving plaintiffs' fraudulent concealment avoidance, rather than requiring the nonmoving plaintiffs to demonstrate the existence of a genuine issue

of material fact with respect to the elements of that claim, as this Court's precedents mandate.

In addition, the panel's opinion has inappropriately lowered the bar for plaintiffs seeking to invoke the fraudulent concealment doctrine to avoid statutes of limitations with respect to both the inquiry notice and due deligence requirements. And, it does so in the face of this Court's admonition that statutes of limitations are vital to the welfare of society and are favored in the law. This Court should accept certiorari review to clarify this important area of the law and prevent the mischief that would be caused were the panel decision to stand.

I. The Eleventh Circuit's Requirement That Defendants Come Forward With Undisputed Facts On Summary Judgment To Negate Plaintiffs' Claim Of Fraudulent Concealment Directly Conflicts With This Court's *Celotex* Decision, And Other Relevant Decisions Of This Court And The Circuits.

The panel ignored the well-settled summary judgment standard by placing on defendants a burden heavier than that required by this Court of a party seeking summary judgment on the basis that there was insufficient evidence to support one or more elements of the nonmoving party's claim.

In the mid-1980s, this Court clarified the standard district courts should apply when considering summary judgment motions filed pursuant to Fed. R. Civ. P. 56. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the Court held that "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's

case." *Celotex*, 477 U.S. at 325. This Court disagreed that "the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." *Id.* Rather, the Court mandated that summary judgment be entered where the party who bears the burden of proof at trial fails to make a showing—in opposition to a summary judgment motion—sufficient to establish the existence of an element essential to that party's case. *Id.* at 322-23. Put differently, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

Justice Brennan, writing for the dissent in *Celotex*, agreed with the majority's recitation of the summary judgment standard and elucidated the moving party's "burden of establishing the nonexistence of a 'genuine issue.' " *Id.* at 330 (Brennan, J., dissenting). Justice Brennan explained the two ways by which the moving party can satisfy its burden:

> If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satify Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. *Second, the moving party may demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.*

Id. at 330 (emphasis added). Under the *Celotex* standard, then, once a defendant comes forward and points to insufficient evidence to support one or more crucial *factual* elements of a plaintiff's claim, the burden shifts to the

plaintiff to establish that there indeed is a genuine issue of fact to be decided by the jury.

The panel in this case announced a summary judgment standard directly at odds with *Celotex* and with decisions of the First, Third, Seventh, and Eighth Circuits. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1260 (1st Cir. 1996) (affirming summary judgment for defendants on plaintiffs' fraudulent concealment claim where plaintiffs failed to point to evidence to support inference that they were diligent); *In re TMI*, 89 F.3d 1106, 1116-17 (3rd Cir. 1996) (affirming summary judgment against plaintiffs where plaintiffs failed to direct court to any evidence of defendants' concealment); *Chapple v. Nat'l Starch & Chem. Co. and Oil*, 178 F.3d 501, 506-07 (7th Cir. 1999) (affirming summary judgment on statute of limitations grounds where plaintiff failed to put forth evidence supporting each element of fraudulent concealment claim); *In re TMJ Implants Products Liability Litigation*, 113 F.3d 1484, 1497-98 (8th Cir. 1997) (affirming summary judgment in favor of defendant on plaintiff's fraudulent concealment claim where plaintiff failed to put forth evidence to support even the first element of claim); *Exeter Bancorporation, Inc. v. Kemper Securities Grp., Inc.*, 58 F.3d 1306, 1315 (8th Cir. 1995) (same).

In doing so, the panel embraced an outdated standard prevalent before this Court's decision in *Celotex*. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979) ("The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit."); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984) (holding that the burden of showing lack of due diligence shifted to defendant). Like the Eleventh Circuit,

the Fifth Circuit also seems to have embraced the outmoded *Beef Industry* standard (even after *Celotex*), stating in *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1533 (5th Cir. 1988) that "[t]he approach we adopted in *Beef Industry* has not been altered by the Supreme Court's recent refinement of the summary judgment standard, at least insofar as it applies in this case."

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 855 (1990), this Court emphatically declared that "*Celotex* made clear that Rule 56 does not require the moving party to negate the elements of the nonmoving party's case." The panel, in this case, flatly ignored this directive, instead requiring just such a showing for defendants to obtain summary judgment on plaintiffs' fraudulent concealment claim. Thus, the panel required the defendants to go beyond pointing out the absence of any evidence supporting at least two elements of plaintiffs' fraudulent concealment claim, and instead, required defendants to prove conclusively on summary judgment that which plaintiffs bore the burden of proving at trial. That was plainly wrong.

The propensity for mischief created by the panel's opinion can be resolved summarily by this Court upon granting this Petition, since the panel's announced standard for summary judgment directly conflicts with a clear rule announced by this Court. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (per curiam) (granting petition for certiorari and summarily reversing court of appeals); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 644 (1980) (per curiam) (same). The conflict created by the panel's errant decision here calls for immediate guidance, before it is relied upon by other Circuits in similar situations, as well as the district courts in the Eleventh Circuit. The application of the Eleventh Circuit panel's standard by other courts will obviate the

policy behind this Court's decision in *Celotex*, which was to facilitate entry of judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

This rule and policy underlying *Celotex* is particularly significant in the context of a fraudulent concealment avoidance to a statute of limitations defense, as here. As this Court long ago wrote in *Wood v. Carpenter*, 101 U.S. 135, 139-40 (1879), "statutes of limitations are vital to the welfare of society and are favored in the law." Thus, the plaintiff who invokes the doctrine of fraudulent concealment will be "held to stringent rules of pleading and evidence." *See also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (stating, "[statutes of limitations] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them") (internal quotation and citation omitted).

If left to stand, the panel's opinion would effectively eviscerate the availability of summary judgment to a defendant when a plaintiff seeks to avoid the statute of limitations by invoking the fraudulent concealment doctrine. The conflict between the panel's opinion and this Court's summary judgment standard is of paramount importance warranting this Court's review and summary reversal.

II. The Eleventh Circuit's Rule That A Plaintiff Is Not On Inquiry Notice Unless It Has "Actual Or Constructive Knowledge" Of Its Claim Conflicts With The Standard Established By This Court And Other Circuits That A Plaintiff Is On Inquiry Notice When It Possesses "Facts Sufficient To Excite Suspicion."

The Eleventh Circuit panel's fundamental error with respect to the summary judgment burden was compounded

by its announcement of a novel and erroneous standard for determining when an antitrust plaintiff, seeking to avoid a statute of limitations bar, is on inquiry notice sufficient to give rise to a duty to investigate the possibility of an antitrust claim. The panel defined "inquiry notice" as the time when "the plaintiff is . . . charged with knowledge of his claim [because] . . . he *should have* discovered the basis for his claims." (App. A at 21a (emphasis in original); *see also id.* at 18a ("even if it were undisputed that plaintiffs had notice regarding the possibility that [the] Dairies might be fixing their prices, this does not mean that plaintiffs had either actual or constructive knowledge of their claim.")). Thus, the panel incorrectly equated the time that a plaintiff has knowledge of facts sufficient to *file a claim* with the earlier time when a plaintiff is on inquiry notice because it has sufficient facts to *investigate* a possible claim.

The "constructive or actual knowledge" standard articulated by the Eleventh Circuit conflicts with the standard announced by this Court and applied by at least the First, Fifth, Sixth and Ninth Circuits in antitrust cases. This Court has declared that, under the tolling doctrine, suspicion of the existence of a claim, by itself, triggers a plaintiff's duty to investigate: "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Wood v. Carpenter*, 101 U.S. 135, 141 (1879) (citing *Kennedy v. Greene*, 3 Myl. & K 722); *see also Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (stating, "[a]ny fact that should excite his suspicion is the same as actual knowledge of his entire claim" and once events "should have aroused [plaintiff's] suspicions, . . . its failure to in-

vestigate further at that time was not the exercise of due diligence required in order to employ the fraudulent concealment doctrine"); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 158 (9th Cir. 1989) (affirming summary judgment for defendants on limitations ground because plaintiff's "suspicions" should have been "excited," and plaintiff did not exercise due diligence); *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1533 (5th Cir. 1988) (stating that plaintiff was on inquiry notice when he had "learned of facts 'calculated to excite inquiry' ") (citation omitted); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984) (stating, "even if Berkson's suspicions were purely conjectural in 1972 and became concrete only later, a 'plea of ignorance' standing alone 'is insufficient to avoid the statute [of limitation].' If Berkson wished to bring an action based on his suspicions he was under a duty to exercise due diligence in investigating whether the suspicions were well founded.") (citation omitted); *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1478 (6th Cir. 1988) (stating, "[t]o hold that a tolling or suspension of the limitation of actions must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations . . .").[3]

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[3] The panel's error likely stemmed from its borrowing from inapposite securities fraud cases, where the statute of limitations operates differently and is far shorter than for antitrust—one year from discovery of the securities fraud violation and in no event more than three years after the violation occurred. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 (11th Cir. 1993). The antitrust statute of limitations, of course, is not a "discovery statute," but rather an accrual statute, under which a claim *accrues* from the time of injury. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Although the standard for inquiry notice in a securities case *would* require knowledge

The panel's inappropriate standard lowers the bar for plaintiffs seeking to use the fraudulent concealment doctrine to avoid statutes of limitations. Moreover, it does so in the face of this Court's admonition that statutes of limitations are vital to the welfare of society and are favored in the law. *See Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Certiorari review is needed to correct the Eleventh Circuit and resolve this incipient conflict before continued misapplication of the law occurs.

III. The Eleventh Circuit's Rule That A Plaintiff On Inquiry Notice Need Not Exercise Due Diligence In Order To Avoid Summary Judgment On The Ground Of Fraudulent Concealment Conflicts With The Decisions Of This Court And Other Circuits, And Contravenes Important Policy Considerations That Underlie Statutes Of Limitations.

The Eleventh Circuit panel further compounded its error by holding that a plaintiff, once on inquiry notice, need not exercise due diligence in order to take advantage of the fraudulent concealment doctrine to toll the antitrust statute of limitations. (App. A at 22a.) It held that "[t]he actual exercise of diligence is irrelevant . . . . [A]lthough a plaintiff has an 'obligation of diligence,' the plaintiff need not show the actual exercise of diligence in order to 'toll' the limitations period." *Id.* (internal quota-

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of facts sufficient to state a claim in order for the limitations period to begin, that is not the standard for inquiry notice under the fraudulent concealment doctrine, which is an avoidance to an antitrust statute of limitations defense, and thus involves a different context and different policy considerations. *See Sterlin v. Biomune Systems*, 154 F.3d 1191, 1195-96 (10th Cir. 1998) (recognizing qualitative distinction between equitable tolling and accrual of a discovery statute of limitations; stating they are "fundamentally inconsistent"); *Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997) (stating, "the Supreme Court has held that, given the discovery rule, there is no defense of equitable tolling . . . .")

tion and citation omitted.) In other words, "[b]oth the diligent and the non-diligent plaintiff are protected from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment." (*Id.* at 23a.)

The Eleventh Circuit's holding that "the actual exercise of diligence is irrelevant" once again conflicts with this Court's decisions. In *Wood v. Carpenter*, 101 U.S. 135, 141 (1879), for example, this Court held that a plaintiff seeking to invoke the fraudulent concealment doctrine must "aver and show that he used due diligence to detect it." The Court declared that if a plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery, and "the delay which has occurred must be shown to be consistent with the requisite diligence." *Id.* at 143. Because "[s]tatutes of limitation are vital to the welfare of society and are favored in the law," the plaintiff who invokes the doctrine of fraudulent concealment must be "held to stringent rules of pleading and evidence." *Id.* at 139-40.

Similarly, in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997), this Court held that, in the context of civil RICO, " 'reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert fraudulent concealment." *Id.* at 194. The Court reached this conclusion after observing that, in the antitrust context, that case law "uniformly supports" the requirement that the plaintiff exercise diligence in order to assert fraudulent concealment. "We have found many antitrust cases that say the same, and none that says the contrary." *Id.* at 194-95.

The Eleventh Circuit panel's holding also conflicts with the application of the due diligence standard by other Circuits. Like the district court below, these other Cir-

cuits have ruled that a plaintiff seeking to invoke the doctrine of fraudulent concealment to avoid the operation of the four-year antitrust statute of limitations must plead and prove: (1) wrongful concealment of their actions by defendants; (2) failure by the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) such failure to discover occurred despite the *exercise of due diligence on the part of such plaintiff*. *See, e.g., Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (plaintiff's "failure to investigate further at that time was not the exercise of due diligence required in order to employ the fraudulent concealment doctrine to avoid the bar of the statute of limitations"); *Wills Trucking, Inc. v. Baltimore & Ohio R.R. Co. (In re Lower Lake Erie Iron Ore Antitrust Litig.)*, 998 F.2d 1144, 1179 (3rd Cir. 1993) (affirming summary judgment for defendant, stating that "the exercise of due diligence must be shown in the antitrust context"); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) (affirming summary judgment for defendant because plaintiff "introduced no evidence from which the district court could infer that it exercised diligence to learn the facts before the statute barred its claim"); *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). *But see Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 128 (4th Cir. 1995) (stating, "it is possible for a plaintiff to satisfy that element without demonstrating that it engaged in any specific inquiry" and "if reasonable further inquiry would not have revealed the basis for the antitrust claim, the plaintiff's claim is not time-barred"). *Cf. Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1096 n.19 (7th Cir. 1992) (recognizing conflict in context of ERISA claim).

In *Berkson*, for example, the First Circuit reviewed the plaintiff's "voluminous submissions" in opposition to the summary judgment motion but found "no trace of any allegation, let alone a showing sufficient to raise a genuine issue of fact, concerning the first and third elements of fraudulent concealment." The court stated:

> If Berkson [the plaintiff] wished to bring an action based on his suspicions, he was under a *duty to exercise due diligence* in investigating whether the suspicions were well founded. There is absolutely no indication in the record, however, of any particular attempt on Berkson's part to engage in discovery or make a 'conscientious effort' to substantiate the suspicions he voiced to the district court in Louisiana in 1972. . . . *Conclusory allegations of due diligence are not sufficient*; . . . where a plaintiff has utterly failed to make even the requisite allegations, he cannot claim that his underlying cause of action was fraudulently concealed.

Id. at 56-57 (emphasis added). This requirement of actual diligence only makes sense in light of the correct standard for inquiry notice—that the plaintiff prove it did not possess facts sufficient to excite its suspicion as to the *possibility* of a claim. *See supra*, Section II. Such suspicion may or may not lead to the discovery of facts giving rise to a claim. However, unless a plaintiff on inquiry notice is required to exercise diligence and undertake an investigation of those facts, the law will unaccountably reward the dilitory. This too flies in the face of the policy that statutes of limitation "stimulate to activity and punish negligence." *Wood*, 101 U.S. at 139.

The record below is undisputed that the plaintiffs failed to exercise due diligence in 1988. Although plaintiffs successfully argued before the Eleventh Circuit that the exercise of due diligence should have been excused because

they assert it would have been futile, as noted above, neither this Court nor most other Circuit Courts have accepted such an argument.[4] As a matter of policy, statutes of limitations are to be encouraged, and a bright line requirement that a plaintiff asserting a fraudulent concealment avoidance, once on inquiry notice, demonstrate the exercise of due diligence in order to avoid the limitations bar facilitates that laudable purpose. *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 234 (6th Cir. 1974) (because the plaintiff had not "demonstrated by affidavit or otherwise that it had exercised due diligence in attempting to discover the cause of action," but rather "allowed its claims to slumber" while "[e]vidence . . . faded and witnesses . . . disappeared," the plaintiff could not "avoid the statute of limitations on the ground of the fraudulent concealment rule.").

CONCLUSION

The decision below is not merely wrong; it is mischievous. It permits antitrust plaintiffs to stay idle in the face of plainly suspicious facts, to remain willfully ignor-

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[4] And, in fact, plaintiffs' "futility" argument is contrary to the record. It is undisputed that the 1988 news articles about the Florida antitrust lawsuit prompted Jay Gurmankin, an attorney for Albertson Supermarkets, to investigate possible commercial price-fixing. By early 1991, according to Mr. Gurmankin's uncontroverted testimony, he had taken statements from dairy representatives, and subsequently asserted his claim within four years of being placed on inquiry notice of February 1988. *Id.* Although the Eleventh Circuit implied that Mr. Gurmankin relied upon "special knowledge" in his investigation (App. A at 24a), at deposition, Mr. Gurmankin rejected plaintiffs' suggestion that he learned of the antitrust investigations or was prompted to investigate on behalf of Albertson's by virtue of something other than the public reports of the government investigation. (R10-276A-19-20.) Thus, the Eleventh Circuit improperly rejected the *only* record evidence on this point. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (credibility determination improper at summary judgment).

ant of their claim for as long as is convenient, and then to file an untimely action while invoking the rubric of "fraudulent concealment." Then, when such a claim is filed, the decision denies summary judgment to defendants even when there is no record evidence to support the dilatory plaintiffs' fraudulent concealment avoidance. As a result of this approach, defendants lose summary judgment as a well-established and useful tool for positing an early challenge to the sufficiency of plaintiffs' proof while plaintiffs are relieved of the duty for diligence this Court has demanded for over one hundred years. The decision should not stand.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2498

D. C. Docket Nos. 93-1077-CIV-T-23B,
93-1264-CIV-23A, 94-1437-CIV-T-23A, 95-35-CIV-23B

MORTON'S MARKET, INC.;
J & J PRODUCE AND DELI, INC.,
Plaintiffs-Appellants,

versus

GUSTAFSON'S DAIRY, INC.,
Defendant,

BORDEN, INC.; T. G. LEE FOODS, INC., *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(December 20, 1999)

Before ANDERSON, Chief Judge, HILL, Senior Circuit Judge, and COOK*, Senior District Judge.

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* Honorable Julian Abele Cook, Jr., Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

HILL, Senior Circuit Judge:

Plaintiffs brought these consolidated antitrust actions against most of the large dairy producers in Florida. The district court held the actions time-barred and granted summary judgment for the defendants. Both plaintiffs appeal.

I.

J & J Produce & Deli, Inc. and Morton's Market, Inc. are retailers of milk. Gustafson's Dairy, Inc., Borden, Inc., Pet, Inc., Flav-O Rich, Inc., the Southland Corporation, T.G. Lee Foods, Inc., and McArthur Dairy, Inc. (the Dairies) engaged in the production and sale of milk in Florida. The parties agree on the following facts.

Beginning in the early 1970s, the Dairies conspired and combined to rig their bids for contracts to supply milk to the public school districts in Florida. The Dairies submitted artificial bids and effectively divided the school milk market among themselves.

In mid-1987, the United States and the State of Florida began investigating anti-competitive activities in the dairy industry. During July and August of 1987, Florida's Attorney General subpoenaed documents from and deposed employees of many dairies operating in Florida. On February 16, 1988, Florida filed a civil lawsuit against ten dairies, many individuals, and certain milk distributors. The complaint alleged that the Dairies violated federal antitrust laws. Florida also alleged that the defendants fraudulently concealed their activities by secretly conducting meetings and confining to key individuals information regarding the Dairies' efforts unreasonably to restrain trade.

The investigations, criminal charges, and civil action were reported in February 1988, by the major newspapers in Florida. The newspaper articles discussed the Dairies'

agreements among themselves to rig bids for school milk and revealed that the federal government was also scrutinizing the industry. Edmund Morton, the president of Morton's Market, read at least some of these articles. The principal of J & J Produce and Deli heard from her spouse that Florida had sued the Dairies. The plaintiffs did not, however, undertake any investigation into whether the Dairies were also fixing the price of milk to retailers.

During late 1987 and early 1988, the United States Department of Justice charged the Dairies and some of their employees with criminal antitrust violations. Several individuals pled guilty to rigging bids for school milk contracts. Between 1990 and 1992, all of the Dairies, except Gustafson's pled guilty to conspiring to rig bids for school milk contracts. Information regarding price-fixing of wholesale milk prices was contained in each of these guilty pleas, the first of which occurred in December of 1990. Gustafson's was charged with price-fixing in May of 1992, and pled guilty in August to conspiring to fix the prices of milk in Florida and Georgia between the early 1970s through at least August of 1988.

On July 1, 1993, subsequent to the government proceedings, plaintiffs each filed an antitrust action under Section 4 of the Clayton Act, 15 U.S.C. § 15 (the Act), on behalf of itself and a class of direct purchasers of dairy products in Florida. Both actions assert that the Dairies fixed, raised and maintained the wholesale prices of dairy products to commercial customers by collusive agreements in violation of the Sherman Act, 15 U.S.C. § 1.

The Dairies moved for summary judgment, contending that these actions are time-barred by the Act's four-year statute of limitations. 15 U.S.C. § 15(b). They assert that their price-fixing activities, if any, terminated in 1987 or 1988, with their school bid-rigging prosecutions, more than four years before these actions were filed in 1993.

Plaintiffs countered that the price-fixing conspiracy continued until 1992, when Gustafson's pled guilty to fixing the price of milk in Florida. Plaintiffs also contended that the statute of limitations was tolled in this case by the Dairies' fraudulent concealment of their price-fixing activities,[1] and by the Clayton Act itself, which tolls the running of the statute during government proceedings concerning related violations. 15 U.S.C. § 16(i). Additionally, Pet and Southland claimed that they withdrew from the alleged conspiracy in 1985 and 1988 respectively, and that plaintiffs did not timely file as to them.

The district court granted the Dairies' motions for summary judgment. We review this grant of summary judgment *de novo* applying the same standards as the district court. *Industrial Partners, Ltd. v. CSX Transp., Inc.*, 974 F.2d 153 (11th Cir. 1992). For the following reasons, we reverse those judgments.

II.

There has been considerable confusion in this case over the application of the statute of limitations and the impact of equitable or statutory tolling of it. Some of this con-

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[1] The district judge who originally presided in the J & J Produce case denied Gustafson's motion to dismiss on the statute of limitations issue, specifically holding that the price-fixing conspiracy "had been continuous at least until 1992" and that plaintiff's fraudulent concealment claim "has merit." In December of 1994, plaintiffs in both cases settled with Gustafson's. Upon court approval of the settlement, Gustafson's was to pay $1.5 million to the class and provide cooperation in the action againt the remaining dairies. In January, plaintiffs moved for approval of the settlement, but, before it could be granted, the J & J Produce case was transferred to the district judge who had the Morton's Market case, and the two cases were consolidated. After much delay, on October 30, 1997, the district judge, without oral argument, granted the Dairies' motions for summary judgment on the statute of limitations issue. Almost a year later, the district court granted preliminary approval of the settlement with Gustafson's.

fusion has been created by the failure of both parties to distinguish between the accrual of an antitrust cause of action and the scope of damages available in such an action. We cannot know whether plaintiffs' actions are time-barred unless we know when the statute began to run. Once we know when the statute began to run, we can determine whether and how it was tolled in this case and what impact that tolling has on the scope of plaintiffs' damages.

A. *The Commencement of the Statute of Limitations*

Under the antitrust laws, "a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures the plaintiffs' business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). A plaintiff must file his claim within four years following defendant's injurious act. 15 U.S.C. § 15(b). Suit may be brought more than four years after the events that initially created the cause of action only if the action is commenced within four years after the defendant commits (1) an overt act in furtherance of the antitrust conspiracy or (2) an act that by its very nature constitutes a "continuing antitrust violation." *Zenith*, 401 U.S. at 338.[2]

An act constitutes a "continuing violation," if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts "continuing and accumulating harm" on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 15 (1968). For example, when sellers conspire to fix the price of a product, each time a

[2] Of course, suit may also be brought more than four years after accrual of the antitrust cause of action if the statute is tolled for some reason.

customer purchases that product at the artifically inflated price, an antitrust violation occurs and a cause of action accrues. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). As a cause of action accrues with each sale, the statute of limitations begins to run anew.

> Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," e.g., each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Id. 521 U.S. at 189 (quoting 2 Areeda, ¶ 338b, at 145).

Plaintiffs allege such a continuing price-fixing conspiracy. Plaintiffs claim that the Dairies conspired to fix the retail prices of milk in Florida over a twenty-year period, and that sales at these fixed prices continued at least until 1992, when Gustafson's pled guilty to price-fixing. Thus, even if there were no price-fixing conversations after 1987, as the Dairies contend,[3] if plaintiffs purchased milk at a fixed price after that date, the purchase would constitute an overt act that injured it. A cause of action would accrue with each purchase and a new statutory period would begin to run. *See Zenith*, 401 U.S. at 338.

The commencement of the statute of limitations is a question of fact. *In re Beef Indust. Antitrust Litig.*, 600 F.2d 1148, 1169-70 (5th Cir. 1979). It cannot be determined upon motion for summary judgment if there is

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[3] The district court also found that there were none, characterizing evidence of a price-fixing conversation in 1988 as "isolated and ambiguous." In weighing the evidence, the district court found a fact against plaintiffs in violation of Rule 56(c), Fed. R. Civ. P.

a genuine question as to when it began to run. *Id.* Upon motion for summary judgment, the district court's task was simply to determine whether a genuine question was presented for trial. The district court held there was not. The court found that "the record reveals that any price-fixing activity occurred concurrently with the bid-rigging" [4] and "the record lacks any competent evidence that the defendants unlawfully contrived the prices they charged commercial customers after 1987."

Even if this were so, these facts would not require a finding that these actions are time-barred. There is evidence in this record, including the Dairies' bid-rigging guilty pleas and Gustafson's price-fixing guilty plea and the factual bases therefor, from which a jury could find that the Dairies participated in a price-fixing conspiracy which resulted in a series of unlawfully high priced sales to plaintiffs over a period of years, continuing into the limitations period. Where there is evidence of the continuing nature of an agreement to eliminate competition, absent an affirmative showing of the termination of that agreement, the conpsiracy must be presumed to have continued. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir. 1982). The Dairies do not point to any evidence that they reduced their artificially high prices or returned to competitive pricing prior to 1992. Therefore, whether the conspiracy continued into the limitations period by virtue of continued sales at fixed prices is a genuine question for trial.[5] Should the jury find that plaintiffs purchased milk at fixed prices beyond 1989, even though plaintiffs could have sued in the 1970s, they were equally entitled to sue in 1993. *Hanover Shoe*, 392 U.S. at 502.

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[4] The court, however, did not point out what this evidence was.

[5] Of course, after the development of the evidence, the jury will ultimately determine these facts.

If at trial, however, the jury finds that this conspiracy did not continue into the four-year limitations period immediately preceding July 1, 1993, when plaintiffs filed these claims, then these actions are time-barred unless the statute was tolled.

B. *Tolling the Statute of Limitations*

Plaintiffs advance both statutory and equitable grounds for tolling the statute of limitations in this case. We consider each in turn.

1. *Statutory Tolling*

Congress has provided for the tolling of statutes of limitations in private antitrust actions which are based in some part on prior government proceedings. 15 U.S.C. § 16(i) provides:

> (i) Suspension of limitations. Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

The government commenced its antitrust proceedings against these defendants on March 1, 1990. Those proceedings concluded on August 7, 1992, when Gustafson's pled guilty to price-fixing.[6] Therefore, should it be found that the statute of limitations began to run in 1988, as the Dairies contend, if Section 16(i) applies, it tolled the statute in 1990, prior to its expiration, and these actions

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[6] Defendants concede plaintiffs may tack together the periods during which the statute was tolled by the various government proceedings against each of these defendants.

were timely-filed in 1993 (within one year of the termination of the last proceeding in 1992).[7]

The district court held, however, that Section 16(i) does not apply. The district court based its conclusion on its observation that "[bid-rigging] is not the same violation as price-fixing," and its assumption that such a "direct correlation" between the two causes of action is required. Plaintiffs contend this was error.

Section 16(i) applies if there is a "real relationship" between the government proceeding and the subsequent private actions. *Leh v. General Petroleum Corp.*, 382 U.S. 54, 65-66 (1965).[8] Generally, we look for this relationship by comparing the allegations of the two complaints. *Id.* In *Leh*, the Supreme Court was asked whether Section 16(i) applies when the allegations in the subsequent private action are different with respect to time period, geographic scope, and alleged wrongdoers. The Court held that it does, minimizing those distinctions:

> The private plaintiff is not required to allege that the same means were used to achieve the same ob-

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[7] This issue is only relevant to plaintiffs' claims against T.G. Lee Foods, Inc., Borden, Inc., Flav-O-Rich, Inc., and the Southland Corporation. Gustafson's pled guilty to fixing commercial prices so the tolling effect of Section 16(i) is not at issue. Plaintiffs do not contend that Section 16(i) tolls the statute of limitations with respect to Pet Inc. or McArthur Dairy, Inc., both of which were not sued until 1994.

[8] It is at this point that the parties exchange positions. Plaintiffs, who argued that they didn't learn about the price-fixing because price-fixing is nothing like bid-rigging, now assert that "the link between the conspirators' school milk bid-rigging and commercial milk price-fixing is manifest." The Dairies, who contended that bid-rigging was just one form of price-fixing, and that the bid-rigging publicity notified plaintiffs that the Dairies were fixing prices, now argue that the bid-rigging charges involved "an entirely different cause of action" from the price-fixing claims.

> jectives of the same conspiracies by the same defendants. Rather, effect must be given to the broad terms of the statute itself—'based in whole or in part on any matter complained of'—read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief.

Id. The Court made very clear that the courts must not allow a legitimate concern that invocation of Section 16(i) be made in good faith to lead them into a miserly or stingy construction of the statutory language. *Id.*

In a companion case, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), the Court extended *Leh* to hold that Section 16(i) applies to toll the limitations period during the pendency of the government proceeding even when the subsequent private plaintiff claims a different statutory violation.

Section 16(i) applies, therefore, even if, after the government proceeding, the private plaintiff alleges that the defendants used different means to achieve different objectives so long as there is a real relationship between the activities complained of in each proceeding. *Id; Leh*, 382 U.S. at 59-60. The conspiratorial acts alleged by the private plaintiff must be "intertwined with and fundamentally the same" as those alleged in the government action. *Maricopa County v. American Pipe and Const. Co.*, 303 F. Supp. 77 (D. Ariz. 1969). If there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences. *Leh*, 382 U.S. at 54.

The Tenth Circuit has found this standard to be met where the private action alleges similarity in proof, means of carrying out the conspiracy, and subject matter. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 570 (10th Cir. 1961). Section 16(i) applies, the court held, if the private plaintiffs allege substantially the same sort of conspiracy against a similar cast of characters who relied at least in part on the same means for effecting their conspiracy. *Id.* Reliance by the private plaintiff on the same documentary and oral proof to establish the conspiracy bolsters the decision that Section 16(i) applies. *Id.* Similarly, the Ninth Circuit has held that Section 16(i) applies when the private plaintiff alleges a conspiracy that includes the objectives, means, time span, and geographic scope of the conspiracy alleged in the government suit, and the evidence adduced in the government suit is of practical assistance to plaintiffs in proving their own complaint. *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 832 (9th Cir. 1983).

In this case, the private plaintiffs allege a conspiracy that is similar to the government prosecution in terms of defendants, geographical scope, and time frame. There is also a "real relationship" between the objectives of both conspiracies. In both the bid-rigging and price-fixing conspiracies, the Dairies engaged in collusive behavior designed to eliminate competition in the wholesale marketplace in Florida during the 1970s, 1980s, and possibly into the 1990s.

The only significant difference between the allegations of the government prosecution and these actions concern the means involved—bid-rigging and price-fixing. Their purpose was the same—to eliminate competition in the wholesale marketplace in Florida. In rigging their bids to school districts, the Dairies sought to divide the whole-

sale market to schools amongst themselves. Similarly, in fixing their prices to plaintiffs, the Dairies sought to divide the wholesale market to groceries amongst themselves. Although bid-rigging and price-fixing are not the same means, there appears to be a "real relation" between them in the context of this case.[9]

This same conclusion was reached in a similar set of circumstances in Arizona. In that case, the federal government brought both criminal and civil actions against several Arizona dairies, including one of the defendants in this case, alleging a wholesale price-fixing conspiracy. Subsequently, the state of Arizona and a private plaintiff sued the dairies as well as several grocery stores alleging a retail price-fixing conspiracy. *In re Arizona Dairy Products Litig.*, 1984-2 CCH Trade Cases ¶ 66,284 (D. Ariz. 1984). In holding that the retail price-fixing conspiracy allegations were based in part on matters complained of by the federal government and bore a "real relation" to the prior proceeding, the court disregarded the difference in the markets. Instead, the court concluded that the conspiracy alleged by the private paintiff was "at least in part the same conspiracy as was the object of the Governments suit." *Id.*

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[9] The Dairies cite only two cases in support of their contention that there is no real relationship between their bid-rigging activities and their price-fixing activities. Neither case is helpful. In *Peto v. Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967), a conspiracy to monopolize boxing was not related to a conspiracy to monopolize hockey, especially since the "only similarity between the two actions is found in the fact that some of the defendants are the same." In *Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D. Haw. 1985), Section (i) did not apply because the two complaints alleged different markets, different defendants, different means of proof and "wholly different actions on the part of the defendants as the basis for establishing liability."

We too believe that these actions bear a real relation to the prior government proceedings because they are, at least, a part of the Dairies' conspiracy to avoid competition in their sales of milk in Florida during this time period. The Dairies are alleged, just as in the government's proceedings, to have eliminated competition among themselves by agreeing to divide the wholesale milk market instead of competing for it through the vehicle of price. In the government's proceedings, the Dairies eliminated price competition and divided the market by agreeing on the price of a successful bid to a school district. In these actions, they are alleged to have eliminated price competition and divided the market by agreeing on the price of milk to retailers. Accordingly, these latter price-fixing activities bear a real relationship to the prior price-fixing activities.

In addition, there may be substantial reliance by the plaintiffs on the oral and documentary proof contained in the government's cases because the Dairies' plea agreements all contain uncontradicted statements that they engaged in commercial price-fixing. These statements provide an evidentiary basis for plaintiffs' present claims.

Therefore, because these actions are based in part on the government's proceedings, both factually and in the proof on which these plaintiffs will rely, we conclude that Section 16(i) tolled the statute of limitations on plaintiffs' claims from March 1, 1990 until August 7, 1992. These claims, therefore, were timely filed.[10] Even though they timely-filed, however, plaintiffs may recover damages for

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[10] This holding does not extend to Pet and McArthur. As to Pet's liability, see Section II. C. McArthur may be liable only on a theory of continuing conspiracy or fraudulent concealment, and then only if it was sued within four years of either the last purchase at a fixed price or plaintiffs' discovery of their claim against it.

only the four-year period immediately preceding the filing of their claims unless the statute was tolled for some other reason prior to that time. *Zenith*, 401 U.S. at 338. Plaintiffs assert there was another reason.

2. *Equitable Tolling by Frauduent Concealment*

Fraudulent concealment also tolls the Clayton Act's statute of limitations. *In re Beef Indust. Litig.*, 600 F.2d at 1169. If the Dairies fraudulently concealed their price-fixing activites beginning in the 1970s, then the statute of limitations was tolled during the time of the concealment. If so, plaintiffs may recover damages for all the years during which the conspiracy was frauduently concealed and the statute was tolled. *Id.*

To avail themselves of this doctrine, plaintiffs have the burden of proving at trial that "the defendants concealed the conduct complained of, and that [plaintiffs] failed, despite the exercise of due diligence on [their] part, to discover the facts that form the basis of [their] claim." *Id.*

On motion for summary judgment, however, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). *In re Beef Indust. Litig.*, 600 F.2d at 1170. To be entitled to judgment on this issue, then, the Dairies must show that plaintiffs either knew of their claim or had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims. If the Dairies point to such facts in the record, then plaintiffs must demonstrate that these facts are in dispute. *Id.*

In determining whether there is an issue of fact for trial regarding plaintiffs claim of fraudulent concealment, we must resolve all doubt against the moving party. *Celotex*, 477 U.S. at 323. This standard is applied with particular stringency where it is claimed that the defendant's conduct prevented the plaintiff from discovering his claim prior to the expiration of the limitations period. *In re Carbon Dioxide Antitrust Litig.*, 1993-2 CCH Trade Cases ¶ 70,436 at 5 (M.D. Fla. 1993).

In fact, we have held, along with a majority of the circuits, that the issue of when a plaintiff is on "notice" of his claim is a question of fact for the jury. *Ballew v. A.H. Robins Co.*, 688 F.2d 1325 (11th Cir. 1982); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985); *Lundy v. Union Carbide Corp.*, 695 F.2d 394 (9th Cir. 1982); *Renfroe v. Eli Lilly & Co.*, 686 F.2d 642 (8th Cir. 1982).

We have also held on numerous occasions that, as a general rule, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question for summary judgment. *Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567, 1572 (11th Cir. 1990) (due diligence is jury issue); *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1509 (11th Cir. 1988) (factual issue of due diligence involves state of mind not resolvable by summary judgment).

In order to be entitled to judgment as a matter of law on these issues, then, the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims, and, that, had they exercised reasonable diligence, they would have discovered adequate grounds for filing this antitrust lawsuit during the limitations pe-

riod. *In re Beef Indust. Litig.*, 600 F.2d at 1171. It is not enough for summary judgment to point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment. To award summary judgment on such a showing is error.

The grant of summary judgment in this case was such an error. The district court held that the newspaper articles regarding the Dairies' bid-rigging put plaintiffs on notice in early 1988 that "defendants were accused of acting jointly to the detriment of other substantial commercial customers," and that "[h]ad the plaintiffs exercised due diligence during the statutory period, they would have discovered most, if not all, of the facts upon which they now base their caims." The Dairies, however, have shown only that there was information in 1988 that *might* have led plaintiffs to inquire, and have made virtually no showing at all regarding what plaintiffs would have discovered had they done so. This is not enough to entitle the Dairies to summary judgment.

In holding that notice of bid-rigging constituted notice to plaintiffs of possible price-fixing, the district court resolved a question of fact against them in violation of Rule 56.[11] The best the evidence can be said to show is that:

> Mr. Morton admitted that he read several articles in *The Sarasota Herald Tribune* about a lawsuit by

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11 Similarly,, there are factual disputes on the issue of affirmative acts of concealment. One defendant's brief, for example, claims that there were no acts of concealment because the allegd false statements to customers regarding why milk prices were going up "were, in fact, true." This is a fact question that only a jury should resolve.

> the Attorney General accusing Defendants in this case of a vast conspiracy to [rig the bids for] milk products sold to Florida schools. These articles were published as early as February of 1988, and Morton was aware from that time forward of *problems the dairy industry was having with the authorities.*

We know of no case, however, in which information regarding one sort of antitrust violation by a defendant has been held, as a matter of law, to constitute notice of all other possible violations. The cases cited by the Dairies for this proposition are all "same violation" cases. In these cases, widely publicized earlier investigations of *exactly the same antitrust violations* were held to constitute adequate notice of others of their possible claims. For example, in the *Beef Industry Antitrust Litigation* case, the prior publicized lawsuit "involved allegations essentially identical to those of the [present lawsuit]." 600 F.2d at 1169. In *Ohio ex. rel. Montgomery v. Louis Trauth Dairy, Inc.*, 1996-1 Trade Cases ¶ 71,396 (S.D. Ohio 1996), press reports of bid-rigging of school milk contracts in Florida put Ohio on inquiry notice regarding Ohio school milk contracts.[12] In *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975), widely-publicized congressional hearings concerned the very same violations sued upon after the expiration of the limitations period by Dayco. Notice that the Dairies were rigging bids to one customer, then, sup-

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[12] The other cases cited by the Dairies are factually dissimilar but they also involve a plaintiff's earlier knowledge of the same wrong later sued upon. *Friedman v. Estate of Presser*, 929 F.2d 1151, 1159-60 (6th Cir. 1991) (later knowledge of role of informant known to plaintiff earlier); *United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) (statute of limitations not tolled in action for illegal investigation where Justice Department held a press conference to announce investigation of Klan and notified Klan of investigation prior to termination of statute).

plies notice that they might be rigging bids to you and triggers a duty to inquire. *In re Beef Indust. Litig.*, 600 F.2d at 1171 ("Those who have learned of facts 'calculated to excite inquiry' must inquire"). The Dairies were not, however, selling to the plaintiffs by a bidding process.

None of these cases, however, holds that notice of one wrong by a defendant triggers a duty for potential plaintiffs to investigate all other potential wrongs the defendant might be committing, and we are unwilling to say that it does as a matter of law. Notice that sellers have come up with a method of extracting undeserved profit from the government does not, as a matter of law, supply notice to the private buyer that the sellers have come up with another method to get into his pocket. Whether notice of rigging bids to schools for milk contracts should have excited these plaintiffs to inquire about possible price-fixing as to milk retailers is a question for the jury and may ultimately depend on credibility choices.[13]

Furthermore, even if it were undisputed that plaintiffs had notice regarding the possibility that Dairies might be fixing their prices, this does not mean that plaintiffs had either actual or constructive knowledge of their claim.

> The plaintiffs' knowledge of [circumstances which did or should have excited them to inquire] is not *as a matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their po-

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13 We find no inconsistency between this holding and our earlier determination that the price-fixing allegations bear a "real relationship" to the prior bid-rigging allegations. Even though there was a real relationship between the Dairies' bid-rigging activities and their price-fixing activities, the newspaper stories were not sufficient, as a matter of law, to reveal this relationship to plaintiffs.

> tential claim, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may *in some circumstances* suffice to give notice, but to rule that it does so as a matter of law is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[14]

In re Beef Indust. Litig., 600 F.2d at 1171 (citations omitted).

The Dairies "had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit." *Id.* They did not, however, address this issue at all in their briefs. Their summary judgment motion refers us only to the newspaper articles and to the fact that plaintiffs did business with some of the individuals criminally charged with bid-rigging. They point to no evidence in this record suggesting that the bid-rigging investigations verified or even publicized any information regarding commercial price fixing prior

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[14] Since the publicized facts underlying the bid-rigging charges were not relevant to plaintiffs' price-fixing claims, and the court pointed to no other facts available to plaintiffs at that time, it appears that the district court's ruling was predicated on its belief that "[h]ad they filed suit at any time between February, 1988, and February, 1992, the plaintiffs could have issued subpoenas, conducted depositions, and propounded interrogatories, as they did after 1993. The plaintiffs could have then formulated the basis for their current action." Thus, the district court's suggestion in this case that plaintiffs should have "filed first and investigated later" seems contrary to Rule 11, Fed. R. Civ. P.

to Gustafson's guilty plea in 1992. Neither do they point to evidence that plaintiffs had independent access before that time to any information, beyond the newspaper articles, that would have tended to verify their suspicions had they had any.[15] In similar circumstance, we have said:

> At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before [the expiration of the limitations period] had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the abence of genuine issues of fact . . . summary judgment must be reversed.

In re Beef Indust. Litig., 600 F.2d at 1171.

Dairies' position is that such evidence is unnecessary because plaintiffs conducted no investigation.[16] They contend that the doctrine of fraudulent concealment is unavailable to a plaintiff who, in fact, exercises no diligence at all.

Although there is some authority for this proposition,[17] the overwhelming weight of authority treats "inquiry no-

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15 In fact, in arguing that their denials of price-fixing to the Florida Attorney General do not amount to affirmative acts of concealment because that investigation was required by law to be secret the Dairies assert that "the information never entered the public domain."

16 Plaintiffs readily admit they did nothing to investigate their claims prior to the 1992 guilty plea by Gustafson's, because, they argue, they had no reason to suspect that they too had been victimized.

17 *See Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 350 (2d Cir. 1993) ("equitable tolling will stay the running of the statute of limitations only so long as the plaintiff has exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud").

tice" as an objective standard.[18] Under this standard, when defendants are guilty of concealing their anti-competitive activities, the plaintiff is not charged with knowledge of his claim until he *should have* discovered the basis for his claims. *In re Beef Indust. Litig.*, 600 F.2d at 1171 (no actual or constructive notice of claim until plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit). *See also Great Rivers Coop. v. Farmland Industries, Inc.*, 120 F.3d 893, 896 (8th Cir. 1997) ("inquiry notice exists when the victim is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge of the defendant's misrepresentations"); *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 128 (1st Cir. 1987) (" 'storm warnings' of the possibility of fraud trigger a plaintiff's duty to investigate in a reasonably diligent manner. . . [and] his cause of action is deemed to accrue on the date when he should have discovered the alleged fraud").

Furthermore, the statute of limitations is tolled until this time. *Duff and Phelps*, 5 F.3d at 492 n.9. *See also Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998) (statute of limitations does not begin to run until plaintiff should have discovered the facts underlying the fraud); *Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997) (statute runs from time plaintiff learns of facts supporting claim).

The scope of the plaintiffs' damages, therefore, depends upon when they should have discovered the facts supporting their claims. This is true regardless of whether they actually investigated. *Marks v. CDW Computer*

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[18] Such a "discovery" accrual rule is commonly applied by the Circuits in securities fraud cases where the plaintiff's cause of action is held to accrue only when he reasonably should have discovered the fraud. *Klehr*, 521 U.S. at 191.

Ctrs., Inc., 122 F.3d 363, 368 (7th Cir. 1997). "Inquiry notice does not begin to run unless and until the investor is able, with the exercise of due diligence (*whether or nor actually exercised*), to ascertain the information needed to file suit." *Id.* (emphasis added); *Caviness v. Derand Resources Corp.*, 983 F.2d 1295, 1303 (4th Cir. 1993) (the limitations period commences "when the plaintiff knows of the facts on which the action is based or has such knowledge as would put a reasonably prudent purchaser on notice to inquire, so long as that inquiry would reveal the facts on which a claim is ultimately based"). In a price-fixing case involving some of these same defendants, the Fourth Circuit concluded that:

> [W]ith regard to the third element of [the fraudulent concealment] test, the due diligence requirement, it is possible for a plaintiff to satisfy that element without demonstrating that it engaged in any specific inquiry. . . . Furthermore, if reasonable further investigation would not have revealed the basis for the antitrust claim, the plaintiff's claim is not time barred. (citations omitted)

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 128 (4th Cir. 1995).

The actual exercise of diligence is irrelevant because the standard is an objective one. As the Tenth Circuit recently explained:

> [A]lthough a plaintiff has an "obligation of diligence," the plaintiff need not show the actual exercise of diligence in order to "toll" the limitations period. Rather in deciding whether the statute should be tolled, it must be determined whether a "reasonably diligent plaintiff" would have discovered the fraud. (citations omitted)

Sterlin, 154 F.3d at 1201. *See also Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694-95 n.16 (10th Cir. 1981) (while equity required actual diligence, modern federal test requires "hypothetical diligence"). *See also Klehr*, 521 U.S. at 1195-96 (in Civil Rico, the concealment requirement is satisfied if the plaintiff shows that he neither knew nor, in the exercise of due diligence, *could reasonably have known* of the offense).

Both the diligent and the non-diligent plaintiff are protected from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment. Neither, however, is protected from the expiration of claims the factual basis for which they could and should have discovered through the exercise of due diligence.[19] As the Seventh Circuit has observed:

> Is mere suspicion discovery? Or, at the other extreme, must the investor have learned (or been in a position where he should have learned) all the facts he needs in order to file suit? . . . [T]he plaintiff gets [the] period of the statute of limitations after he learned or should have learned the facts that he must know to know that he has a claim.

Medco Research, 113 F.3d at 785.

In finding that plaintiffs did not act diligently, the district court did not refer to undisputed facts which support a conclusion that a reasonable investigation would have provided plaintiffs with a basis to sue in 1989. Apparently, however, the court relied[20] upon the affidavit

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[19] This objective standard accommodates the federal antitrust interest in expediting enforcement of economic competition with the federal judicial interest in avoiding groundless or premature suits. *See Sterlin*, 154 F.3d at 1202.

[20] The district court did rely on these affidavits for its conclusion that plaintiffs were on notice that "where there's smoke, there's fire."

of Jay Gurmankin, an attorney who represented Albertson's Supermarkets. Gurmankin's first affidavit states that, prompted by news of the government investigations into bid rigging in Florida in 1988, he conducted an investigation of commercial price fixing, took two sworn statements from bid-riggers, and ultimately negotiated a settlement with one of Albertson's dairy suppliers in 1989. The district court inferred from this affidavit that, if plaintiffs had also investigated in 1988, they too could have discovered the facts which led to Albertson's settlement of their antitrust claims in 1989.

In later testimony, however, Gurmankin conceded that he did not actually take the bid-riggers' statements until 1990 and early 1991. Therefore, they could not possibly have informed Albertson's of the basis for its 1989 settlement. In fact, he acknowledged that the 1989 settlement was in connection with an antitrust lawsuit in Utah, totally unrelated to Albertson's later-discovered antitrust claims in Florida, and that the Florida claims were settled only in the summer of 1991. He also testified that the Florida settlement was achieved during a period when Albertson's was represented not only by himself, but by the same attorneys who, on behalf of the State of Florida, had conducted the investigation into the Dairies bid-rigging activities.

Reliance on these affidavits, which the district court characterized as uncontradicted, is error. They are internally inconsistent and do not establish that Albertson's learned of its Florida claims prior to 1990 or 1991. The Dairies did not, therefore, meet their burden of establishing that there is undisputed evidence in this record which conclusively shows that plaintiffs could have discovered the basis for their claims in 1989, if only they had been duly diligent. The Dairies are not, therefore, entitled to summary judgment on the issue of fraudulent conceal-

ment.[21] If plaintiffs prove fraudulent concealment of price-fixing at trial, they may recover damages co-extensive with the concealment and into the limitations period.

C. *Abandonment of the Conspiracy*

The law recognizes that a conspirator may withdraw from the conspiracy. *Hyde v. United States*, 225 U.S. 347, 369 (1912). Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981). A conspirator who withdraws from the conspiracy is no longer a member of the conspiracy and the subsequent acts of the conspirators usually do not bind him.[22] *Id. See also United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964). The ex-conspirator remains liable, however, for his previous agreement and all damages inflicted by the acts he committed prior to his withdrawal. *Id.*

Withdrawal, therefore, is not a complete defense to the charge of conspiracy. It becomes a complete defense only when coupled with the defense of the statute of limitations. The statute of limitations begins to run upon the conspirator's withdrawal from the conspiracy. *United States v. Antar*, 53 F.3d 568, 584 (3d Cir. 1995). If he is not sued within the limitations period, all claims against him are time-barred. He cannot be held liable for the acts of the other conspirators after he withdrew because his withdrawal effectively ended his membership in the conspiracy.[23] Nor can he be sued for the damages

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[21] Of course, the jury will ultimately determine what these plaintiffs should have known and when they should have known it.

[22] The exception is where a continuing conspiracy is alleged. Since a continuing conspiracy is alleged as one crime, a conspirator is still liable for the crimes of his co-conspirators even after his withdrawal, so long as he is sued during the limitations period.

[23] The continuing conspiracy is the exception.

caused by his previous participation because the limitations period has elapsed. Thus, the interaction of the two defenses of withdrawal and statute of limitations operates to shield the exconspirator of all liability. *Read*, 658 F.2d at 1233.

Pet and Southland sold their dairies in 1985 and 1988 respectively. They contend that these sales constituted an abandonment of the alleged price-fixing conspiracy. If so, the statute of imitations began to run as to plaintiffs' claims against them in 1985 and 1988. We have already decided that Section 16(i) tolled the statute in 1990. Plaintiffs, therefore, timely filed as to Southland. Even if it withdrew in 1988, it remains liable to plaintiffs since they filed during the limitations period. If Pet withdrew in 1985, however, these actions would not be timely filed.[24]

The standard for effective withdrawal has been articulated by the Supreme Court:

> Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65 (1978). Although mere cessation of activity is not sufficient to establish withdrawal, *United States v. Hogan*, 986 F.2d 1364, 1375 (11th Cir. 1993), a conspirator may avoid further liability for his actions if he affirmatively and completely disassociates himself from the con-

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[24] These actions may also be timely-filed against both Pet and Southland on a theory of fraudulent concealment. Under this theory, they would be liable for all damages inflicted by the conspiracy so long as plaintiffs timely filed after they discovered or should have discovered their claims.

tinued operation of the conspiracy. *United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981).

In this circuit, however, it has long been necessary that the conspirator demonstrate that he "undertook affirmative steps, inconsistent with the objects of the conspiracy, to *disavow or to defeat* the conspiratorial objectives." *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987) (emphasis added). "Merely ending one's activity in a conspiracy may not constitute withdrawal." *United States v. Pippin*, 903 F.2d 1478, 1481 (11th Cir. 1990) (citing *Finestone, id.*). The defense of withdrawal is not available to one who merely ceases to participate and does not *affirmatively* withdraw. *United States v. Young*, 39 F.3d 1561, 1571 (11th Cir. 1994); *United States v. Hogan*, 986 F.2d 1364, 1375 (11th Cir. 1993); *United States v. LeQuire*, 943 F.2d 1554, 1564 (11th Cir. 1991).

Pet asserts that its exit from the dairy business constituted an affirmative step sufficient to effectively withdraw it from the conspiracy, and that this act was communicated to the other Dairies by the extensive publicity regarding the sale at the time. Plaintiffs contend that Pet did nothing more than cease its participation in the conspiracy and did nothing to disavow or defeat the purposes of the conspiracy. Furthermore, they contend that Pet did not communicate its withdrawal to the other conspirators.

There is merit to plaintiffs' contentions. The sale of Pet's dairy was not a disavowal of the conspiracy so much as a business decision not to produce milk anymore. Nor did it do anything to defeat the continuation of the other dairies price-fixing.[25] It simply sold its dairy and walked away.

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[25] In fact, as we have noted above, plaintiffs allege that Pet left in place the principal conspirators who continued to fix milk prices for the new owners.

Plaintiffs argue that we should adopt the time-bomb theory of conspiratorial liability. This theory holds that, having set in motion a criminal scheme, a conspirator will not be permitted by the law to limit his responsibility for its consequences by ceasing, however, definitively, to participate.

> Such cessation may or may not be effective withdrawal in a lay sense, but this is one of those places where the law uses a word in a special sense. You do not absolve yourself of guilt of bombing by walking away from the ticking bomb. And similarly the law will not let you wash your hands of a dangerous scheme that you have set in motion and that can continue to operate and cause great harm without your continued participation.

United States v. Patel, 879 F.2d 292, 294 (7th Cir. 1989).

In an alleged price-fixing conspiracy such as this one, the requirement for affirmative steps to defeat the objectives of the conspiracy is especially relevant. Once prices have been set at an artificially high level, no further action by the conspirators is required to effect the objectives of the conspiracy. In such a continuing conspiracy, each sale at the fixed price continues to benefit the conspirators, regardless of whether some members of the conspiracy drop out.

The issue, then, is whether Pet's sale of its dairy, without more, effectively withdrew it from the milk price-fixing conspiracy, or whether some further affirmative step was required to end its liability.

In the context of a business conspiracy, one in which the conspiracy is carried out through the regular activities of an otherwise legitimate business enterprise, the law

has given effect to a conspirator's abandonment of the conspiracy only where the conspirator can demonstrate that he retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy. *Lowell*, 649 F.2d at 955. Resignation from the conspiring business has frequently been held to constitute effective withdrawal. *United States v. Nerlinger*, 862 F.2d 967, 974 (2d Cir. 1988). A conspirator "unquestionably disavow[s] the conspiracy" to fraudulently divert the proceeds of customers' stock trades when he resigns his employment and closes the illicit account. *Id.* Similarly, an employee of a corporaton involved in bribery conspiracy effectively withdrew from conspiracy when he resigned and permanently severed his employment relationship with the corporation. *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982).

The conspirator's break with the other conspirators, however, must be both clean and permanent. *United States v. Pippin*, 903 F.2d 1478 (11th Cir. 1990). For example, a Borden manager involved in the same school milk bid-rigging conspiracy involved in this case, told the other dairies he would no longer participate in that conspiracy, but, nonetheless, honored the prior agreement not to bid for the school milk contracts that remained. *Id.* at 1481. We held that these actions did not contsitute an effective withdrawal. *Id.* at 1482. *See also United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992) (attorney who, despite resigning from the conspiratorial enterprise, continued to be entitled to a percentage of the conspiratorial proceeds did not effectively withdraw).

In order to effectively withdraw, however, it is not necessary for the conspirator to disclose the illegal scheme to

the authorities. *Gypsum*, 438 U.S. at 464-65.[26] Nor is it necessary that the conspirator notify each co-conspirator of the abandonment. *Nerlinger*, 862 F.2d at 974 ("nothing in *Borelli* or any other case requires the hiring of a calligrapher to print formal notices of withdrawal to be served upon co-conspirators").

Did Pet effectively withdraw? With the sale of its dairy, Pet certainly "retired" and totally severed its ties to the milk price-fixing conspiracy. It did nothing more to assist or participate in the price-fixing activities of the other dairies. This retirement was communicated to the other dairies by the media. They knew that from that time on, Pet would not lend its services to the conspiracy. Thus, the purposes of the conspiracy were defeated at least as to Pet. We conclude, therefore, that Pet did effectively withdraw from the price-fixing conspiracy upon the sale of its dairy.

III.

We hold that 15 U.S.C. § 16(i) tolled the statute of limitations prior to its expiration and thereafter plaintiffs timely filed these actions as to all defendants except Pet and McArthur. As to Pet, we hold that it effectively withdrew from the conspiracy in 1985 and, as to it, these actions are not timely-filed. McArthur may be liable only on a theory of continuing conspiracy or fraudulent concealment. As to damages, we hold that there remain genuine issues of material fact as to whether defendants fraudulently concealed their price-fixing activities, thereby tolling the statute at an earlier date and expanding the limitations period. Therefore, defendants are not entitled to summary judgment on this issue.

Accordingly, we AFFIRM IN PART, REVERSE IN PART and REMAND.

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[26] Such a requirement would militate against withdrawal in some cases, thereby undermining the mitigation of danger to society which the defense is designed to encourage.

APPENDIX B

[Filed Oct. 30, 1999]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case Nos. 93-1077-CIV-T-23B
93-1264-CIV-T-23B
94-1437-CIV-T-23B
95-35-CIV-T-23B

MORTON'S MARKET, INC., and
J&J PRODUCE AND DELI, INC.,
Plaintiffs,

v.

GUSTAFSON'S DAIRY, INC., BORDEN, INC.,
T. G. LEE FOODS, INC., FLAV-O-RICH, INC., and
THE SOUTHLAND CORPORATION,
Defendants.

ORDER

This is an antitrust class action in which the defendants seek summary judgment based on the Clayton Act's four-year statute of limitation. Before the Court are the defendants' joint motion for summary judgment (Doc. 229), Pet, Inc.'s ("Pet") motion for summary judgment (Doc. 227), McArthur Dairy, Inc.'s ("McArthur") motion for summary judgment (Doc. 232), and Southland Corp.'s ("Southland") motion for summary judgment (Doc. 233).[1]

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[1] Also before the Court is the plaintiffs' motion to strike the affidavit of Jay D. Gurmankin (Doc. 245). Mr. Gurmankin's affidavits and his deposition testimony are not so discordant as to

The parties agree on the following facts. The plaintiffs are retailers of fluid milk. The defendants are dairies engaged in the production and sale of fluid milk in Florida and other states. Beginning in the early 1970s, the defendants, Borden, Inc. ("Borden"), Pet, Inc., Flav-O-Rich, Inc. ("Flav-O-Rich"), the Southland Corporation, T.G. Lee Foods, Inc. ("T.G. Lee"), McArthur Dairy, Inc., and Gustafson's Dairy, Inc. ("Gustafson's"), conspired and combined to artificially inflate the price of fluid milk to Florida public school districts. The defendants submitted artificial bids and effectively divided the school milk market among themselves. The public schools paid higher prices for milk as a result.

In mid-1987, the United States and the State of Florida began investigating anti-competitive activities in the dairy industry. During July and August, 1987, the Florida Attorney General subpoenaed documents from and deposed employees of many dairies operating in Florida. On February 16, 1988, the State of Florida filed a civil lawsuit against ten dairies, many individuals, and certain milk distributors. The complaint alleged that Southland, Pet, Borden, McArthur, Flav-O-Rich, and others violated federal antitrust laws. The State of Florida also alleged that the defendants fraudulently concealed their activities by secretly conducting meetings and confining to key individuals information regarding the dairies' efforts to unreasonably restrain trade.

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warrant striking the affidavit. Additionally, Mr. Gurmankin is an officer of the Court and a neutral observer. Upon consideration, the motion is DENIIED. The plaintiffs' motion to extend the time to repond to the summary judgment motions (Doc. 238) and motion for leave to file a surreply (Doc. 267) are GRANTED. The Clerk is directed to file the plaintiffs' surreply. The plaintiffs' motion to strike the defendants' motions for summary judgment (Doc. 250) is DENIED. Defendant, Pet Incorporated's, motion to file supplemental memorandum (Doc. 275) is GRANTED.

The investigations, criminal charges, and civil action were reported in February, 1988, by every major newspaper in Florida. The newspaper articles discussed the defendants' agreements to fix prices and bids for school milk and included stern condemnations of the defendants by Florida's Attorney General. The articles announced that the antitrust investigation was the largest ever initiated against the dairy industry, that it had the potential to grow even larger, and that the federal government was also scrutinizing the industry. Edmund Morton, the president of plaintiff Morton's Market, read at least some of these articles. The principal of plaintiff J&J Produce and Deli heard from her spouse that the state had sued the dairies.

During late 1987 and early 1988, the U.S. Department of Justice charged the defendants and some of their employees with criminal antitrust violations. Flav-O-Rich's division manager pled guilty to conspiring to rig bids for school milk. On March 10, 1989, the general manager of Borden's Tampa plant pled guilty to rigging bids for school milk contracts. In 1990, McArthur Dairy, T.G. Lee, Borden, Southland, and Pet pled guilty to conspiring to rig school milk bids. Flav-O-Rich pled guilty to similar charges in 1991. Gustafson's pled guilty in 1992 to conspiracy to fix the prices of fluid milk in Florida and Georgia between the early 1970s and August 1988. The government did not charge any of the defendants with antitrust activity occurring after 1988.[2]

The plaintiffs did not investigate the circumsances that resulted in any of the state or federal charges. They contentedly continued to purchase milk from the defendants during the sundry government actions. They did not

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[2] Except Gustafson's, which was charged in May, 1992, with price-fixing.

inquire of the defendants or the defendants' distributors regarding the prices the plaintiffs paid for milk. The plaintiffs conducted no investigation until contacted by one of their attorneys in 1992 or 1993.

Subsequent to the government actions, the plaintiffs filed these consolidated cases. The plaintiffs allege that, during the same period of time as the bid-rigging and continuing until 1992, the defendants also fixed the milk prices for commercial and wholesale customers. The plaintiffs complain that the defendants' representatives either agreed on the amount and timing of price increases to retailers or agreed to pass certain set portions of fluid milk prices to the plaintiffs.

The defendants argue that the four-year statute of limitation bars the plaintiffs' claims. (The record fails to contain any evidence suggesting that any antitrust violation occurred after July 1, 1989, four years before the plaintiffs' first complaint.[3]) The plaintiffs respond that equitable tolling preserves their otherwise extinguished claims.

Assuming the existence of an unlawful conspiracy to fix prices, the first issue to resolve is the time that the conspiracy terminated. The plaintiffs allege that the price-fixing conspiracy and the acts in furtherance of the conspiracy continued until May 13, 1992. However, the evidence compels the conclusion that the conspiracy ended before 1992.

The state of Florida and the United States began investigating the milk industry five to six years earlier. As early as 1987, knowledge of the state of Florida's investigation of the defendants' bid-rigging was common, at least among industry members. On May 3, 1988, the United States filed the first case resutling from its anti-

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[3] Pet and McArthur were not sued in the first complaint.

trust investigation.[4] Between May, 1988, and June, 1989 (more than four years before the plaintiffs' lodged their first complaint in this case), the United States filed eight more criminal cases resulting from the defendants' rigging of school milk contract bids.[5] By May 25, 1990, five Borden executives had pled guilty and were sentenced for school milk bid-rigging, an especially galling offense against decent citizenship.[6] As early as December 6, 1990, the Department of Justice informed United States District Judge William J. Castagna of its continuing investigation of wholesale price-fixing by dairies (in addition to bid-rigging activities).[7] The Department of Justce noted that the dairy cases garnered prominent and widespread notoriety because of the cumulative impact on an industry so intimately associated with the public's well-being.

The criminal informations resulting from the federal investigation charged the defendants and their employees with bid-rigging and conspiring to rig bids from the early 1970s through 1988. The defendants' plea agreements recognized that the defendants ceased their bid-rigging by July, 1988. The record reveals that any price-fixing ac-

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[4] *United States v. Sunny Florida Dairy, Inc.*, 88-134-CR-T-10C.

[5] *United States v. James T. Hall, et al.*, 88-348-CR-T-10C; *United States v. Christopher C. Howard*, 88-363-CR-T-17C; *United States v. Timothy P. Tanna*, 88-203-CR-J-16; *United States v. A. Lamar Garrett*, 88-385-CR-T-13B; *United States v. Jack Parker Tribble Sr.*, 89-21-CR-T-13B; *United States v. Lenard O. Jackson*, 89-72-CR-T-13A; *United States v. Land-O-Sun Dairies, Inc.*, 89-116-CR-T-13A; and *United States v. Lee P. Hallberg*, 89-130-CR-T-13A.

[6] Edmund Morton testified that he knew two individuals who pled guilty to antitrust charges.

[7] December 6, 1990, letter from Department of Justice attorneys John R. Fitzpatrick and Sylvia T. Andrews-McCoy to the Honorable William J. Castagna, United States District Judge, Middle District of Florida.

tivity occurred concurrently with the bid-rigging. With the arguable exception of one isolated and ambiguous conversation between Tim Tanna of Flav-O-Rich and Joseph Patton of Gustafson's in 1988),[8] the record lacks any competent evidence that the defendants unlawfully contrived the prices they charged commercial customers after 1987.[9]

Section 15b of Title 15, United States Code, which prescribes the limitation on antitrust actions brought by private parties, bars a cause of action pursuant to the antitrust laws unless commenced within four years after the cause of action accrued. Because the defendants demonstrate that the applicable statute of limitation bars the plaintiffs' claim, the plaintiffs must advance an adequate and justified reason that warrants the equitable tolling of the statute. *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340 (5th Cir. 1971). A plaintiff relying on fraudulent concealment to toll a statute of limitation bears the burden of persuasion. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979). To toll the applicable limitation by reason of fraudulent concealment, the plaintiffs must show (1) that the defendants affirmatively concealed facts that are the basis of the plaintiffs' claims,[10] (2) that the plaintiffs failed to dis-

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[8] Based on Mr. Tanna's uncontradicted deposition testimony, Mr. Tanna and Mr. Patton apparently discused the price that a customer paid to a competitor for fluid milk. As a result of this conversation, Flav-O-Rich may have actually lowered its price with respect to that customer. The record fails to contain any evidence tending to show that this exchange, even if improper, caused Flav-O-Rich to raise any prices.

[9] The defendants were, by all accounts, circumspect enough to terminate the illegal bid-rigging (and price-fixing) as a result of the state and federal investigations.

[10] There are two exceptions to the rule requiring affirmative acts of concealment: 1) if the defendant has a fiduciary responsibility

cover those facts within the statutory period, and (3) that the plaintiffs exercised due diligence. *Hill v. Texaco, Inc.*, 825 F.2d 333, 335 (11th Cir. 1987); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218 (4th Cir. 1987). To survive the defensive motions, the plaintiffs must establish the existence of a genuine issue of material fact as to each of these elements. *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988). If considered at the outset, the second and third elements of the defense resolve the issue of the defendants' putative concealment without respect to the first element of the defense.

For the purpose of this motion, I presume that the plaintiffs were unaware of the defendants price-fixing before 1987. However, by February 13, 1988, the plaintiffs knew or should have known that the state of Florida had filed a lawsuit alleging bid-rigging against members of the dairy industry. The plaintiffs knew or should have known that the state of Florida believed the defendants' antitrust conspiracy to be the largest in the state's history. The accompanying circumstances of this case are easily suffi-

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to disclose (not alleged here), and 2) if the wrong is considered "self-concealing". *Hill v. Texaco, Inc.*, 825 F.2d 333, 325 n.2 (11th Cir. 1987).

The plaintiffs argue that the nature of the defendants' actions are "self-concealing". However, concealment is not an attribute that uniformly attends an episode of price-fixing. *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 123 (4th Cir. 1995); *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1529 (5th Cir. 1988). As with nearly every illegal scheme, antitrust conspirators seek to restrict public knowledge of the unlawful plan. To conspire otherwise is to unaccountably invite incarceration. The concealment to which the applicable limitation defers is not the attempt of the perpetrators to avoid detection but some inherent aspect of the offense that insulates the perpetrator against detection by the hapless victim. The acts of which the plaintiffs complain are therefore not "self-concealing", unlike, for example, corporate espionage or electronic surveillance.

cient to visit on the plaintiffs the legal burden of knowledge that the dairies and their distributors were accused of crimes and were fined or imprisoned accordingly. Although public information may not have alerted the plaintiffs to the specific facts of their particular claims, the readily available and richly publicized information reasonably would arouse in a person of normal apprehension an acute suspicion that they may constitute the object of a criminal enterprise afoot in the pertinent industry.[11]

Albertsons supermarket, a grocery chain situated similarly to the plaintiffs, learned of the state of Florida's bid-rigging suit against the defendants. Jay Gurmankin, former "outside counsel" for Albertsons, provided two uncontradicted affidavits indicating that the government investigations and ensuing lawsuit aroused Albertsons's suspicions. Mr. Gurmankin's testimony about the reason the defendants' bid-rigging spawned Albertsons's pursuit of an independent investigation, although no more than a familiar platitude, is succinct and telling: "[W]here there's smoke, there's fire." This is particularly true because the state of Florida alleged in its February, 1988, lawsuit that the defendants had fraudulently concealed their conspiratorial activities. The plaintiffs seek to toll the statute of limitations until the government established a viable cause of action the plaintiffs could adopt. However, consequent to inquiry notice, the limitations period is not tolled while a plaintiff conducts discovery or some other investigation in an effort to confirm or bolster his suspicions. *Prather*, 446 F.2d at 341.[12]

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[11] In their papers, counsel for the plaintiffs asserts that the connecton between bid-rigging and price-fixing is "manifest".

[12] "Once the statute of limitations has been tolled, it is not necessary that plaintiff obtain a thorough understanding of all the facts to halt the suspension. Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of

The third element, due diligence, is inextricably linked to the plaintiffs' imputed knowledge. " '[R]easonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment'." *Klehr v. A.O. Smith Corp.*, —— U.S. ——, 117 S. Ct. 1984, 1993, 138 L. Ed. 2d 373 (1997).[13] The purpose of private antitrust actions is not merely to compensate victims but also to expedite enforcement of the pro-competitive economic policies of the United States by encouraging private litigation by victims who diligently detect, investigate, and economically deter unlawful activity. *Id.*

The plaintiffs' inquiry notice of the pending federal criminal investigations and prosecutions and the state's civil lawsuit should have prompted the plaintiffs to investigate the defendants' conduct with respect to commercial customers. At the least, the state of Florida's accusations that the defendants fraudulently concealed their antitrust related activities should have prompted the inquiry. The plaintiffs learned that the defendants were accused of acting jointly to the detriment of other substantial commercial customers (i.e., Florida's school districts). The knowledge that the dairy industry in general and the defendants in particular engaged in an ongoing antitrust conspiracy of troublesome, if not pervasive, magnitude should have excited the suspicions among the plaintiffs as to why the prices for fluid milk were identical among all competitors. Had the plaintiffs exer-

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evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run." *Prather*, 446 F.2d at 341.

13 Justice Scalia's concurrence, although critical of the majority's "piecemeal" approach to the RICO statute of limitations, further supports my conclusion that the plaintiff must demonstrate that he "neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." *Klehr*, —— U.S. at ——, 117 S. Ct. at 1993, 138 L. Ed. 2d 373 (Scalia, J., concurring in part and concurring in judgment).

cised due diligence during the statutory period, they would have discovered most, if not all, of the facts upon which they now base their claims. "To hold that a tolling or suspension of the limitation of actions must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them." *Pinney*, 838 F.2d at 1478.

In view of the entire record, I am unable to conclude that the plaintiffs acted diligently. The public records describing the criminal informations and the investigations of both the state and federal governments were readily available to the plaintiffs. *See In re Beef Industry*, 600 F.2d at 1169-70. In 1987, the public knew that the defendants' employees had been subpoenaed and charged with criminal violations. On February 13, 1988, every major newspaper in the state announced the dairy industry's alleged antitrust violations. In the following months, the United States prosecuted the dairies and their employees. One by one, the plaintiffs' acquaintances at the dairies were prosecuted for criminal antitrust activities. Even if they did not know all of the facts supporting their current claims, the plaintiffs should have conducted some investigation, formal or informal, by February, 1988, regarding the existence of *potential* claims against the defendants.[14] Had they filed suit at any time between February, 1988, and February, 1992, the plaintiffs could have issued subpoenas, conducted depositions, and propounded interrogatories, as they did after 1993. The

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[14] Because the plaintiffs did not diligently investigate their potential claims at the time they had actual or constructive knowledge of the defendants' antitrust violations, I need not determine the extent of the defendants' concealment.

plaintiffs could have then formulated the basis for their current action.[15]

The plaintiffs also argue that adverse effects on the price of milk lasted beyond the last overt act, thereby extending the limitations period. However, absent special circumstances, the statute of limitations runs from the commission of the injurious act rather than from the recognition of the resulting injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39, 91 S. Ct. 795, 806 (1971). The plaintiffs' claims are devoid of the special circumstances readily apparent in *Zenith Radio.*

Zenith sued Hazeltine for antitrust violations arising from Hazeltine's participation in so-called "patent pools". Many years after Hazeltine's injurious acts, Zenth claimed to suffer continuing damages. Changing market conditions "five to 10 years hence" precluded Zenith's proving damages at the time of those acts, because both the existence and extent of those damages lacked certainty. 401 U.S. at 341-42, 91 S. Ct. at 807-08. Zenith argued that, because the damages (future lost profits) were so speculative, a cause of action could not have accrued at the time of the defendant's acts.

Generally, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio*, 401 U.S. at 338,

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15 I reviewed the conduct of which the plaintiffs complain. I find that some acts occurring before February, 1988, could cause me to conclude that a factual question of actual concealment is present. However, the record is also clear that by early 1988, the great bulk of the evidence upon which the plaintiffs now rely, as well as the state of Florida's allegations of antitrust violations and fraudulent concealment, resided notoriously in the public domain.

91 S. Ct. at 806. An exception exists in the special circumstance where the plaintiff demonstrates future damages are so speculative or conjectural as to effectively prohibit calculation of their amount and nature. 401 U.S. at 339, 91 S. Ct. at 806. *Zenith Radio* holds that had the plaintiff, Zenith, tried to recover its future lost profits at the time of the defendant's conspiratorial acts, Zenith's damage claims "would have probably gotten short shrift in the lower courts." 401 U.S. at 341-42, 91 S. Ct. at 807-08.

The exception described in *Zenith Radio* is inapplicable to the claims asserted by the plaintiffs in this action, who allege damages (the difference between competitive market price and actual price) readily calculable at the time of the defendants' infractions. Had the plaintiffs sought to recover future lost profits seven years ago, the fact finder at that time could have determined the nature and amount of damages. In fact, the necessary calculation is the lowest and simplest common denominator for a present showing of future damages. No special circumstances, like those in *Zenith Radio*, obscure the plaintiffs' damages or reduce them to the realm of conjecture or speculation. The plaintiffs advance no competent evidence that either the existence of economic loss or the extent of the loss was not fairly calculable and readily identifiable at the time of the defendants' transgressions against the antitrust laws of the United States.[16] The defendant's alleged price-fixing (and bid-rigging) terminated no later than the end of 1987. Consequently, the cause action accrued and the limitations period commenced before 1989.

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[16] Because they seek to invoke an exception and avoid the limitations bar, the plaintiffs bear the burden of demonstrating that their alleged damages were so speculative as to prevent calculation and recovery. *Kabealo v. Huntington Nat. Banks*, 17 F.3d 822, 827 (6th Cir. 1994).

Finally, the plaintiffs rely on 15 U.S.C. Section 16(I) to toll the statute of limitations. Section 16(I) suspends the running of the statute of limitations in private antitrust actions during the pendency of any criminal or civil antitrust proceeding brought by the United States and for one year thereafter. 15 U.S.C. § 16(I). The limitations period is suspended only with respect to those private claims based in whole or part on the actions complained of in proceedings by the United States. An action so suspended is forever barred if not brought within four years after the cause of action accrued or within the suspension period. Section 16(I) does not suspend the running of the statute of limitations if the United States initiates its proceedings more than four years after the cause of action accrued.

Section 16(I) provides the plaintiffs no relief. The plaintiffs' action is not based in whole or in part upon the actions complained of in any of the United States' proceedings prior to May, 1992, by which time the statute of limitations had run. The government investigated and charged the defendants with rigging the bids for school milk contracts. While bid-rigging is a proscribed antitrust activity, and the government's broad investigation should have aroused the plaintiffs' suspicions of potential claims, it is not the same violation as price-fixing. Despite some similarities between the two causes of actions, the plaintiffs did not sue the defendants for the defendants' bid-rigging. Thus, there is no direct correlation between the causes of action such that the United States' criminal prosecutions would suspend the limitations that govern the plaintiffs' claims.

Admittedly, these defendants are egregiously culpable in some respects for their corporate activities. The instincts of the citizenry are justly aroused in hostility against those who would profit, quite literally, by robbing

from the mouths of our children. However, two considerations intrude into this collision between the commonweal and corporate spoliation of the public's trust. First, the government, through the criminal laws, has meted out punishment. Second, the statutes of limitations persist over the years for good and established reasons and should not succumb to sophistry simply to further discipline parties already called to task by the prosecutor. The motions are GRANTED. The Clerk is directed to enter judgment against the plaintiffs and in favor of defendants Borden, Pet, Flav-O-Rich, Southland, T.G. Lee, and McArthur.

ORDERED in Tampa, Florida, on October 30th, 1997.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
United States District Judge

APPENDIX C

[Filed Mar. 23, 1998]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case Nos. 93-1077-CIV-T-23B
93-1264-CIV-T-23B
94-1437-CIV-T-23B
95-35-CIV-T-23B

MORTON'S MARKET, INC., and
J&J PRODUCE AND DELI, INC.,
Plaintiffs,

v.

GUSTAFSON'S DAIRY, INC., BORDEN, INC.,
T. G. LEE FOODS, INC., FLAV-O-RICH, INC., and
THE SOUTHLAND CORPORATION,
Defendants.

ORDER

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court concludes that there is no just reason to delay entry of final judgment in favor of defendants Borden, Pet, Flav-O-Rich, Southland, T.G. Lee, and McArthur in accordance with the Court's October 31, 1997, order (Doc. 287). The Clerk is directed to enter judgment accordingly.

ORDERED in Tampa, Florida, on March 22nd, 1998.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
United States District Judge

(2)

No. 99-1537

Supreme Court, U.S.
FILED
APR 17 2000
CLERK

IN THE

Supreme Court of the United States

BORDEN, INC., FLAV-O-RICH, INC., McARTHUR DAIRY, INC., THE SOUTHLAND CORPORATION and T.G. LEE FOODS, INC.,

Petitioners,

v.

MORTON'S MARKET, INC. and J&J PRODUCE & DELI, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent has a parent corporation and no publicly held company owns 10% or more of the stock of either respondent.

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2 P. *Areeda and H. Hovenkamp, Antitrust Law*, ¶ 338 (rev'd ed. 1995) 9

Respondents Morton's Market, Inc. and J. & J. Produce and Deli, Inc. ("plaintiffs" or "respondents") respectfully request that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (the "Petition") submitted by Borden, Inc., Flav-O-Rich, Inc., McArthur Dairy, Inc., The Southland Corporation and T.G. Lee Foods, Inc. ("defendants" or "petitioners") to review a judgment of the United States Court of Appeals for the Eleventh Circuit which reversed an order of the United States District Court for the Middle District of Florida granting petitioners' motion for summary judgment.

COUNTERSTATEMENT OF THE CASE

Petitioners are dairies which conducted business, *inter alia*, throughout the state of Florida during all or part of the period between 1970 and 1992. In May, 1992 another dairy, Gustafson's Dairy, Inc. ("Gustafson's") pled guilty to a one count information charging it with conspiring with unnamed co-conspirators to fix, maintain and stabilize the price of milk to commercial customers in the state of Florida. *See* R11-26 (Ex. A). The newspaper articles reporting Gustafson's plea were the first public reports of commercial price fixing by a dairy in Florida. Gustafson's was sentenced in August, 1992. Plaintiffs' suits followed in 1993.

The record evidence provides details of the conspiracy, including evidence that the Gustafson's unnamed co-conspirators included petitioners herein. In addition, the record is filled with evidence that petitioners fraudulently concealed their price-fixing scheme from the public for two decades. *See, e.g.*, R9-243 (Ex.4 at 41, 47-48); R9-243 (Ex. 6 at 25-26, Ex. 7 at 41-4).

In addition to conspiring to fix commercial prices, petitioners were also illegally rigging bids for contracts to supply milk to schools throughout Florida. In mid-1987, the State of Florida and the federal government began investigations into school milk bid rigging and, in February, 1988, the State filed a civil suit against some of the petitioners and other dairies. R9-243 (Ex. 37). The State's complaint and the attendant publicity surrounding the investigation were silent as to petitioners' commercial price-fixing activities. *Id.*

In this action, petitioners moved for summary judgment on statute-of-limitations grounds, arguing that plaintiffs' suit was untimely as it had not been filed within four years of the bid-rigging publicity. By order dated October 30, 1997, the district court granted petitioners' motions. It held that the newspaper articles regarding the school milk bid-rigging scheme constituted, as a matter of law, notice to commercial customers of petitioners' price-fixing conspiracy. (Petition at 37a-38a). Although the district court acknowledged that the record contained evidence that petitioners had fraudulently concealed the conspiracy, it determined that such facts need not be addressed because plaintiffs had not investigated their claims after the school milk bid-rigging articles appeared. (Petition at 39a-40a; *see also* 41a, n.15). The district court suggested that plaintiffs should have first sued the dairies and then conducted discovery to "formulate[] the basis for their current action." (Petition at 40a-41a).

On December 20, 1999, a panel of Eleventh Circuit unanimously reversed the district court's grant of summary judgment. The court of appeals held that, in "holding that notice of bid-rigging constituted notice to plaintiffs of possible price-fixing, the district court resolved a question

of fact against them in violation of Rule 56." (Petition at 16a (footnote omitted)). The court of appeals further held that, even if it were undisputed that plaintiffs were on notice that defendants were fixing their prices, defendants had the burden, as moving parties, to demonstrate that an investigation by plaintiffs would have uncovered adequate ground for filing suit. (Petition at 18a-19a). The court of appeals found that petitioners had not met this burden. This petition followed.

SUMMARY OF ARGUMENT

The issues raised in the petition present no novel or unique questions of constitutional or statutory interpretation worthy of review by this Court. The decision of the court of appeals turned on a rich factual record, is firmly rooted in the precedents of this Court, follows a long and unbroken line of authority in the Eleventh Circuit, and is fully consistent with the case law in other circuits. The alleged "conflicts" which the defendants strive to create are nonexistent.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict With This Court's *Celotex* Decision Or Other Relevant Decisions Of Courts Of Appeals

Defendants' argument that the Eleventh Circuit applied a different summary judgment standard than that articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) is simply wrong. This attempt to craft a conflict between the decision below and *Celotex* is premised on a flawed interpretation of *Celotex*.

In *Celotex*, plaintiff had alleged that her husband's death had resulted from exposure to asbestos manufactured or distributed by numerous defendants. One defendant moved for summary judgment, asserting that plaintiff had failed to produce evidence that her husband was exposed to its products. The central question before this Court was whether, under Rule 56, the moving party was required to come forward with affidavits or other affirmative proof to support its motion on an issue where plaintiff had the burden of proof at trial.

This Court held that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 417 U.S. at 323. From this holding, defendants claim that the Eleventh Circuit should have excused them from the initial burden of pointing to undisputed facts in the record entitling them to summary judgment on the issue of fraudulent concealment of the alleged conspiracy. (*See* Petition at 7-8). This position is insupportable.[1]

In *Celotex*, this Court did not modify the burden on the moving party to establish the absence of a disputed material fact on an issue which the non-moving party had the burden of proving at trial. It confirmed that

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1. Furthermore, it was the existence of genuine issues of material fact in the record that was fatal to defendants' summary judgment motion — not a purported error in determining which party had the burden of pointing to such facts.

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323.

Here, the Eleventh Circuit specifically cited and applied the *Celotex* standard. (Petition at 14a) ("On a motion for summary judgment, however, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law.") For the defendants to have met their initial burden on the fraudulent concealment issues, they needed to point to undisputed facts in the record which demonstrated that plaintiffs "either knew of their claim or had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims." (Petition at 14a). They could not do so and do not claim otherwise. Thus, after thoroughly reviewing the record, the court of appeals correctly found that defendants were not entitled to summary judgment as the record contained genuine issues of material fact.

First, the Eleventh Circuit found that the record contained factual disputes regarding defendants' concealment of the conspiracy. (Petition at 16a, n.11).[2]

2. One such factual dispute was actually highlighted by one of the defendants. (*See* Petition at 16a, n.11). Additionally, even the district court conceded that some of the acts in the record "could

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As to the question of notice, an issue rarely resolvable on summary judgment, the court of appeals rejected the defendants' argument that the newspaper articles regarding their bid-rigging scheme established as a matter of law that plaintiffs were on notice of commercial price fixing violations.

> None of [the cases cited by defendants], however, holds that notice of one wrong by a defendant triggers a duty for potential plaintiffs to investigate all other potential wrongs the defendant might be committing, and we are unwilling to say that it does as a matter of law. Notice that sellers have come up with a method of extracting undeserved profit from the government does not, as a matter of law, supply notice to the private buyer that the sellers have come up with another method to get into his pocket. Whether notice of rigging bids to schools for milk contracts should have excited these plaintiffs to inquire about possible price-fixing as to milk retailers is a question for the jury and may ultimately depend on credibility choices.

(Petition at 18a) (footnote omitted). Finally, as to plaintiffs' due diligence, defendants could point to no evidence in the record that an investigation would have led to the discovery of adequate ground for filing suit and, as the Eleventh Circuit

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(Cont'd)
cause me to conclude that a factual question of actual concealment is present." (Petition at 41a, n.15). The district court, however, concluded that it "need not determine the extent of defendants' concealment" because it had decided that plaintiffs had not acted diligently. (Petition at 40a, n.14).

noted, defendants "did not . . . address this issue at all in their briefs." (Petition at 19a).[3]

As set forth above, the court of appeals applied the same summary judgment standard as required by Rule 56 and *Celotex* and found, correctly, that defendants had failed to point to undisputed facts in the record entitling them to summary judgment.

II. The Eleventh Circuit's Holdings That A Plaintiff Is Not Charged With Knowledge Of His Claim Until He Should Have Discovered The Basis For Such Claims And That A Plaintiff Is Not Required To Conduct A Fruitless Investigation Do Not Conflict With Decisions Of This Court Or Other Decisions Of Courts Of Appeals

Defendants also attempt to manufacture a conflict between the Eleventh Circuit's holding that the statute of limitations is tolled until a plaintiff has "actual or constructive knowledge" of its claim and the standard established by this Court in *Wood v. Carpenter*, 101 U.S. 135, 141 (1879) (citing *Kennedy v. Greene*, 3 Myl. & K 722), that "[w]hatever is notice enough to excite attention and put the party on guard and call for inquiry, is notice of every thing to which such inquiry might have led." (Petition at 12-13). There is no conflict at all. In both cases a party is charged with notice of only the information that an inquiry would have revealed.

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3. The court of appeals also pointed out that defendants had asserted, in the context of arguing that their denials of price-fixing to the Florida Attorney General were not acts of concealment because that investigation was required by law to be secret, that "the information [from the government's inquiry] never entered the public domain." (Petition at 20a, n.15).

Defendants further assert that the Eleventh Circuit's holding that a party is not precluded from asserting the fraudulent concealment doctrine to toll the statute of limitations where that party did not conduct a fruitless investigation conflicts with settled law that fraudulent concealment is unavailable to a plaintiff who has not conducted an investigation even where such an investigation would not have uncovered a basis to file suit. (Petition at 15-16). Defendants have misstated the precedents of this Court and other courts of appeal, all of which are consistent with the decision below.[4]

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-196 (1997), this Court held that, as in antitrust cases, the fraudulent concealment doctrine in RICO cases embodied a due diligence requirement.[5] The Court cited with approval Professor Areeda's formulation of the fraudulent concealment doctrine in the antitrust context: "[T]he concealment requirement is satisfied only if the plaintiff shows [at trial] that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense."

4. This issue is academic, or at best premature, since it only arises where, unlike here, a plaintiff is found to have had sufficient information to put him under a duty to investigate. Accordingly, since the Eleventh Circuit held that inquiry notice here is a question for the jury, petitioners are asking this Court to rule on an issue that may never be reached. This alone is sufficient for a denial of *certiorari*.

5. Most decisions interpreting due diligence, including *Klehr*, are factually distinguishable from the case below. They involve the situation where, unlike here, a factual basis to sue was discoverable to the plaintiff who investigated. In *Klehr*, for example, plaintiff needed only to open the door on his silo to learn of the defective condition forming the basis for his suit. *See* 521 U.S. at 185.

2 P. *Areeda and H. Hovenkamp, Antitrust Law*, ¶ 338, at 152 (rev'd ed. 1995). This Court also cited as settled authority *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1533 (5th Cir. 1988) where the Fifth Circuit held that "the statute of limitations is tolled only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim." Each of these formulations charge the plaintiff with only the knowledge he would have obtained though a reasonable investigation and make no suggestion that due diligence requires a party to conduct an investigation doomed to failure.

The court of appeals decisions cited by defendants are consistent with this doctrine. The Fourth Circuit's holding in *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 128 (4th Cir. 1995) is in explicit agreement with the Eleventh Circuit. ("[I]t is possible for a plaintiff to satisfy [the due diligence requirement] without demonstrating that it engaged in any specific inquiry. . . . [I]f reasonable further inquiry would have not revealed the basis for the antitrust claim, the plaintiff's claim is not time-barred.")[6] The Third, Fifth, Sixth and Ninth Circuits have not addressed the issue directly, but are in implicit agreement. In *Wills Trucking, Inc. v. Baltimore & Ohio R.R. Co. (In re Lower Lake Erie Iron Ore Antitrust Litig.)*, 998 F.2d 1144, 1179 (3d Cir. 1993) the Third Circuit stated, as petitioners quote, that the exercise of due diligence must be

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6. Petitioners cite *Charlotte Telecasters Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) in support of their position. However, that case merely confirms that there is a requirement for due diligence but does not treat the consequences of failing to investigate where an investigation would not have uncovered a basis to sue. Accordingly, it did not inhibit the Fourth Circuit from adopting the same rule as the Eleventh Circuit now has.

shown. However, defendants have omitted the language preceding the quote that tolling ceased when facts sufficient to sue "were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding concealment. . . ." (*Id.*) (quoting *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1179 (6th Cir. 1988)). The Third Circuit went on to hold that "[w]hat the [plaintiffs] knew about the railroads' rate-making should reasonably have made them aware of a basis for asserting the very claim now being raised." *Id.*[7] Likewise, in *Eichman v. Fotomat Corp.*, 880 F.2d 149, 158 (9th Cir. 1989) the Ninth Circuit specifically held that "[t]hrough the exercise of due diligence [plaintiff] could have discovered [a factual basis to sue]."

Finally, the First Circuit has not as yet taken a position. In *Berkson v. Del Monte Corp.*, 743 F.2d 570, 574 (1st Cir. 1976), the court of appeals held that there was no concealment, but it stated in dictum that "[i]f [plaintiff] wished to bring an action based on his suspicions, he was under a duty to exercise due diligence in investigating whether the suspicions were well founded." *Id.* Nowhere did the First Circuit state that the failure to investigate was fatal even if an investigation would have produced no basis to sue.

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7. The Fifth Circuit formulation in *Texas v. Allan Constr. Co.* is set forth at p. 9, *supra*.

The decision below is consistent with settled law. Further, defendants have not presented an "extraordinary case" that would merit the exercise of jurisdiction, and, as such, defendants' request for review is premature.

CONCLUSION

In light of the foregoing arguments, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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